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In the Supreme Court of the United States

OCTOBER TERM, 1988

C. WILLIAM VERITY, JR., SECRETARY OF COMMERCE, ET AL., PETITIONERS

v.

CENTER FOR ENVIRONMENTAL EDUCATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the Marine Mammal Protection Act of 1972, 16 U.S.C. (& Supp. IV) 1361 *et seq.*, which authorizes the Secretary to issue permits in specified circumstances for the taking of marine mammals incidental to commercial fishing (see 16 U.S.C. (& Supp. IV) 1371(a)(2)), prohibits the Secretary from issuing a permit for the incidental taking of a nondepleted species of marine mammal when the same fishing activities will result in the incidental taking of another species for which a permit cannot lawfully be issued under the Act.

PARTIES TO THE PROCEEDING

The petitioners are C. William Verity, Jr., in his official capacity as Secretary of Commerce, William E. Evans, in his official capacity as Undersecretary for Oceans and Atmosphere, James W. Brennan, in his official capacity as Assistant Administrator for Fisheries, National Marine Fisheries Service, Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, and the Secretary of Transportation.

The respondents are the Center for Environmental Education, Greenpeace U.S.A., The Humane Society of the United States, The Whale Center, Animal Protection Institute, Society for Animal Protective Legislation, Kokechik Fishermen's Association, Aulayaat Fishermen's Association, Alaska Sportfishing Association, Sierra Club, Joseph Chimegalria, on behalf of himself and all persons similarly situated, and Federation of Japan Salmon Fisheries Cooperative Association.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of C. William Verity, Jr., Secretary of Commerce, et al., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-31a) is reported at 839 F.2d 795. The opinion of the district court (App., *infra*, 32a-57a) is reported at 679 F. Supp. 37.

JURISDICTION

The court of appeals entered its judgment (App., *infra*, 62a-63a) on February 16, 1988. A timely petition for rehearing was denied (App., *infra*, 64a-67a) on May 11, 1988. On July 28, 1988, Chief Justice Rehnquist extended the time within which to file a petition for a writ of cer-

tiorari to and including September 8, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Marine Mammal Protection Act of 1972 (MMPA), 16 U.S.C. 1361, provides, in relevant part:

> The Congress finds that –
>
> (1) certain species and population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of man's activities;
>
> (2) such species and population stocks should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part, and, consistent with this major objective, they should not be permitted to diminish below their optimum sustainable population. * * *

Section 101(a)(2) of the MMPA, 16 U.S.C. (& Supp. IV) 1372(a)(2), provides, in relevant part:

> There shall be a moratorium on the taking and importation of marine mammals and marine mammal products * * * except in the following cases:
>
> * * * * *
>
> (2) Marine mammals may be taken incidentally in the course of commercial fishing operations and permits may be issued therefor under section 1374 of this title subject to regulations prescribed by the Secretary in accordance with section 1373 of this title. In any event it shall be the immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate * * *.

Section 103(a) of the MMPA, 16 U.S.C. 1373(a), provides, in relevant part:

> The Secretary, on the basis of the best scientific evidence available and in consultation with the Marine Mammal Commission, shall prescribe such regulations with respect to the taking and importing of animals from each species of marine mammal (including regulations on the taking and importing of individuals within population stocks) as he deems necessary and appropriate to insure that such taking will not be to the disadvantage of those species and population stocks and will be consistent with the purposes and policies set forth in section 1361 of this title.

Section 104 of the MMPA, 16 U.S.C. 1374, provides, in relevant part:

> (a) **Issuance**
>
> The Secretary may issue permits which authorize the taking or importation of any marine mammal.
>
> (b) **Requisite provisions**
>
> Any permit issued under this section shall—
>
> (1) be consistent with any applicable regulation established by the Secretary under Section 1373 of this title, and
>
> (2) specify—
>
> (A) the number and kind of animals which are authorized to be taken or imported,
>
> (B) the location and manner (which manner must be determined by the Secretary to be humane) in which they may be taken, or from which they may be imported,
>
> (C) the period during which the permit is valid, and
>
> (D) any other terms or conditions which the Secretary deems appropriate.

STATEMENT

Petitioners seek review of a decision setting aside a regulation and permit issued by the Secretary of Commerce for the taking of Dall's porpoise incidental to the fishing activities of the Federation of Japan Salmon Fisheries Cooperative Association (Federation). The court of appeals ruled that the Secretary lacks authority under the Marine Mammal Protection Act of 1972 (MMPA), 16 U.S.C. (& Supp. IV) 1361 *et seq.*, to issue a permit for an incidental taking of one species unless he concludes that permits are likewise warranted for the incidental taking of any other species that would be affected by the same fishing activities.[1]

1. The MMPA prescribes the circumstances under which marine mammals may be "take[n]"—that is, harassed, hunted, captured, or killed (16 U.S.C. 1362(12))—in United States waters. With certain exceptions, the MMPA imposes "a moratorium on the taking" of marine mammals (16 U.S.C. (& Supp. IV) 1371(a)), and therefore makes it unlawful for any person to take any marine mammal in waters that are subject to United States jurisdiction (16 U.S.C. (& Supp. IV) 1371(a)). Persons who violate this stricture are subject to civil penalties of up to $10,000 per taking (16 U.S.C. 1375(a)(1)), and the cargoes of vessels that are employed in the unlawful taking of marine mammals are subject to seizure and forfeiture (16 U.S.C. 1376). In addition, knowing violations of the MMPA may be prosecuted as criminal offenses (16 U.S.C. 1375(b)).

The MMPA contains an exception, however, that allows the Secretary of Commerce to issue permits authorizing specified takings that are incidental to com-

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[1] On May 31, 1988, we applied to this Court for a stay (No. A-906) pending the filing and disposition of a petition for a writ of certiorari. On June 9, 1988, the Court denied our stay application.

mercial fishing (16 U.S.C. (& Supp. IV) 1371(a)(2)). The Secretary must issue such permits pursuant to regulations that have been promulgated "on the basis of the best scientific evidence available," and he is directed to "prescribe such regulations with respect to the taking and importing of animals from each species of marine mammal * * * as he deems necessary and appropriate to ensure that such taking will not be to the disadvantage of those species and population stocks and will be consistent with the purposes and policies set forth in [16 U.S.C. 1361]" (16 U.S.C. 1373(a)). Section 1361, in turn, provides that species and population stocks "should not be permitted to diminish below their optimum sustainable population" (OSP), a term that is defined to mean a range above "the number of animals which will result in the maximum productivity of the population or the species" (16 U.S.C 1362(8)). Hence, no permits may be issued for the incidental taking of "depleted" stocks, which the Act defines as a stock that is below its OSP (16 U.S.C. 1362(1)(A)). Consistent with regulations that he promulgates under Section 1373, the Secretary may issue permits "which authorize the taking or importation of any marine mammal" (16 U.S.C. 1374(a)), and that specify "the number and kind of animals which are authorized to be taken" (16 U.S.C. 1374(b)(2)(A)).

Pursuant to Section 14(c) of the North Pacific Fisheries Act of 1954, 16 U.S.C. (Supp. V 1981) 1034(c)), "[a]fter June 9, 1981, the taking of marine mammals incidental to fishing operations by Japanese vessels within the fishing conservation zone shall be regulated pursuant to the [MMPA]."[2] The "fishing conservation zone," now known

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[2] The International Convention for the High Seas Fisheries of the North Pacific Ocean, May 9, 1952 (INPFC), 4 U.S.T. 380, T.I.A.S. No. 2786, which was signed by Canada, Japan, and the United States in 1952 and became effective in 1953, generally governs the Japanese high seas gillnet salmon fishery. Pursuant to the INPFC, Japan agreed

as the "Exclusive Economic Zone" (EEZ), is a 200-nautical-mile-wide zone first asserted by the United States in 1976. The Japanese salmon fishing vessels operating in that area consist of fleets of "catcherboats" operating from "motherships." The catcherboats set "gillnets" that are approximately 15 kilometers long and 8 meters deep, at dusk, and retrieve them in the morning. See App., *infra,* 41a.

Dall's porpoise is a species of porpoise that inhabits the Northern Pacific Ocean and the Bering Sea. Because the food sources of the Dall's porpoise are like those of salmon, the gillnet fishery for salmon incidentally takes some individual Dall's porpoises. Northern fur seals may also be incidentally taken because they feed on the salmon and, as a result, sometimes get entangled in the gillnets holding salmon. Approximately nine out of ten fur seals that become entangled are subsequently freed and released

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to refrain from fishing for salmon in eastern portions of the North Pacific and the Bering Sea where salmon of North American origin were more likely to be caught. Congress implemented the INPFC in enacting the North Pacific Fisheries Act of 1954 (NPFA), 16 U.S.C. 1021 *et seq.* The NPFA was amended in 1978 to conform to a protocol to the INPFC signed by the three nations in the aftermath of the United States' assertion in 1976 of a 200-nautical-mile Fisheries Conservation Zone, now known as the Exclusive Economic Zone (EEZ). Under the new protocol, the eastern boundary of the Japanese fishery was shifted westward to 175° E longitude and, as a result, the protection of North American origin salmon was extended to a 775,000-square-mile area outside of the U.S. EEZ. The Japanese fleet was permitted to fish for salmon in an area of about 80,000 square miles within the U.S. EEZ, limited to the period from June 10 to July 31 and targeted on Asian origin salmon. More recently, the three nations entered into a further INPFC agreement in 1986 under which some Japanese fishing in the Bering Sea beyond the 200-mile limit of the U.S. EEZ will be phased out during the seven-year period ending in 1994. The purpose of this restriction is to decrease the unavoidable interception of North American origin salmon in the area.

unharmed (App., *infra,* 22a n.4) The fishery less frequently captures other species of marine mammals, including northern (Steller) sea lions, Pacific white-sided dolphin, harbor porpoise, and killer whale.

In 1981, the Secretary, acting through the National Oceanic and Atmospheric Administration (NOAA), issued the Federation a three-year permit authorizing annual takes of 5500 Dall's porpoise, 450 northern fur seals, and 25 northern sea lions during salmon operations (see 50 C.F.R. 216.24(d)(5)(vii); App., *infra,* 4a). Although the Japanese salmon fishermen had also requested that the incidental take permit include 50 harbor porpoises, 25 white-sided dolphins, and 25 killer whales, those species were not included in the permit because insufficient information existed in the permit application and in scientific literature to attempt review of the status of those species (see 46 Fed. Reg. 27057 (1981)). In 1982, Congress extended the 1981 permit through June 9, 1987, while simultaneously directing the Secretary to place representatives on Japanese vessels operating within the EEZ to collect data concerning the taking of marine mammals (16 U.S.C. 1034(a) and (b); App., *infra,* 4a).[3]

In 1986, the Federation applied to NOAA for a five-year extension of its 1981 permit (App., *infra,* 5a). After a

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[3] Congress also directed the Secretary to adopt requirements for the purpose of ensuring that new fishing gear or techniques would be implemented to reduce porpoise mortality by the greatest extent practicable (16 U.S.C. 1034(a)(1)). In addition, Congress required the introduction of new fishing gear or techniques, for the entire Japanese fleet "to be eligible for a new permit for the period after June 9, 1987" (16 U.S.C. 1034(a)(2)(D)). Finally, Congress required the Japanese to provide funding for continued joint research on marine mammals incidentally taken in the Japanese salmon fishery, and to continue cooperative research on marine mammals and seabirds (16 U.S.C. 1034(e)-(f)).

hearing, an administrative law judge (ALJ) concluded that a permit should issue that would permit incidental takings in 1987 of 1750 Dall's porpoise and 45 northern fur seals from the Commander Islands stock (App., *infra,* 6a).[4] The Secretary subsequently modified the ALJ's decision, concluding that the Federation should be awarded a three-year permit that authorized the aggregate taking of 789 Dall's porpoise from the Bering Sea and 5250 from the North Pacific Ocean (52 Fed. Reg. 19874 (1987); App., *infra,* 7a-8a).

The Secretary also concluded, however, that the MMPA precluded the issuance of a permit that would authorize the taking of northern fur seals (52 Fed. Reg. 19875, 19877-19878 (1987); App., *infra,* 8a). The Secretary expressed his "confidence in [the ALJ's] conclusion that an annual take of 45 sub-adult male Commander Islands fur seals will not adversely affect a population that is subject to a managed commercial harvest [in the Soviet Union] of 4,000 to 5,500 animals per year," but agreed with the Marine Mammal Commission that "the MMPA requires an affirmative finding by the agency that a stock is within its OSP before a permit may be issued" (52 Fed. Reg. 19878 (1987)). Hence, because the Pribilof Islands stock was depleted and because there was insufficient record information to allow a determination whether the Commander Islands seal population was at its OSP, the Secretary concluded that "the permit will not include any

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[4] Two stocks of northern fur seals are involved in this case: the Commander Islands stock and the Pribilof Islands stock. The total population estimate for northern fur seals is approximately 1,200,000. See 51 Fed. Reg. 47158 (1986). The Secretary has recently declared the Pribilof Islands stock, which is estimated to include 800,000 members, as "depleted," within the meaning of the Marine Mammal Protection Act. See 53 Fed. Reg. 17888 (1988). As described in the text below, the status of the Commander Islands stock, which is located in the Soviet Union, is unknown.

northern fur seals" (*ibid.*). The Secretary further noted that, absent a permit, the Federation would be liable for civil penalties under the MMPA for the taking of any seals and stated that "[t]he MMPA's prohibitions will be enforced * * *" (*ibid.*).

2. Respondents, the Center for Environmental Education, et al., and Kokechik Fishermen's Association, et al., filed petitions for review of the Secretary's issuance of the permit in the United States District Court for the District of Columbia pursuant to the MMPA, 16 U.S.C. 1374(d)(6). The district court granted respondents' motion for a preliminary injunction and barred the Secretary from issuing the permit to the Federation (App., *infra,* 32a-57a). The court found respondents' "claims to be meritorious" and thus concluded "that they have a substantial likelihood of success on the merits" (*id.* at 48a). The court explained that "the permit issued appears to be invalid under the MMPA because a finding that all the marine mammals the Secretary knows will inevitably be taken are at or above their optimum sustainable population level has not been made" (*id.* at 51a). The court rejected the Secretary's contention that the civil penalty provisions of the MMPA are a sufficient mechanism provided by Congress for redressing any incidental taking by the Federation of a species not covered by the permit (*id.* at 53a-54a). Finally, the court concluded that the issuance of a preliminary injunction was also warranted because the Federation's fishing could irreparably harm marine mammals, the Federation would suffer only economic harm, if any, as a result of an injunction, and the public interest favors the protection of the environment over the economic well-being of commercial fishermen (App., *infra,* 55a-57a).

3. The court of appeals affirmed (App., *infra,* 1a-16a). The court agreed with the district court that the

MMPA prevents the Secretary from issuing a permit for the taking of *any* species or stock unless he simultaneously issues a permit for the taking of *all* species that will be affected by the fishing activity (*id.* at 14a-16a). The court stressed that "[u]nder the MMPA, before a permit authorizing a taking may be issued, the Secretary 'must be assured that the taking . . . is in accord[ance] with sound principles of resource protection and conservation as provided in the purposes and policies of this chapter . . .' " (*id.* at 10a, quoting 16 U.S.C. 1371(a)(3)(A)). The court acknowledged that "[w]hile the Act may not prohibit issuance of a permit where there is only a very remote possibility that marine mammals for which an optimum sustainable population has not been determined may be taken incidental to commercial fishing, such a situation is clearly not the case here * * * [because] it is readily apparent that the taking of these marine mammals is * * * a certainty" (*id.* at 12a).

The court of appeals, like the district court, also rejected the Secretary's reliance on the MMPA's civil penalty provisions (App., *infra,* 14a). Instead, the court ruled, the Secretary must "take a systemic view of an activity's effect on marine mammals" (*ibid.*). "A view that the permit process functions merely to determine which takes will be exempted from civil penalities," the court elaborated, "is inconsistent with this duty because it allows—subject to the civil penalty price—illegal takings of other protected marine mammals" (*ibid.*).

Judge Starr dissented (App., *infra,* 17a-31a). He reasoned that "[a]lthough the text of the statute does not provide a definitive answer to this question, the overall statutory scheme contemplates precisely the construction given by [the Secretary]" (*id.* at 18a). Judge Starr explained that Sections 1373 and 1374 of the MMPA "plain-

ly envision[ ] that [the Secretary] will issue permits on a species-by-species basis" (App., *infra,* 19a), and that the legislative history of the MMPA likewise supports the Secretary's position (*id.* at 23a). Judge Starr further explained that, since fishermen cannot know in advance precisely how many animals of a given species they will take, the permit system—which authorizes the taking of precise numbers of mammals—necessarily reflects an understanding that animals in excess of the authorized number occasionally will be taken (*id.* at 20a). Finally, Judge Starr, noting that Congress directed the Secretary to take account of a variety of objectives in administering the MMPA, stated that he would have deferred "to the reasonable resolution" of the question here "by the agency charged by Congress with the task of resolving it" (*id.* at 25a).

REASONS FOR GRANTING THE PETITION

In rejecting the Secretary's longstanding construction of the permitting provisions of the Marine Mammal Protection Act of 1972 (MMPA), the court of appeals departed from this Court's teachings in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984), and converted the carefully crafted legislative compromise embodied in that Act into a rigid and unworkable law. In the MMPA, Congress struck a balance between the competing societal interests in marine mammal protection and commercial fishing. Congress imposed a general moratorium on the taking of marine mammals, but allowed the Secretary to issue permits excluding from that moratorium takings of a species incidental to commercial fishing that would not "disadvantage" the species and its population stocks (16 U.S.C. 1373(a)). Congress subjected those who violate the moratorium by taking a marine mammal in the absence of a permit to severe civil

penalties and the possibility of criminal prosecution (16 U.S.C. 1375(a)(1) and (b)).

Under the court of appeals' view, however, the Secretary of Commerce may properly determine that the incidental taking of a particular species will not disadvantage the species and its population stocks, yet nonetheless be barred by the MMPA from issuing a permit for such a taking. The court of appeals grafted onto the MMPA an additional permitting requirement, reflected nowhere in its statutory language or legislative history, that upsets the equilibrium reached by Congress. The court held that the Secretary can issue a permit for the incidental taking of one particular species only if he is also able to determine that a permit can likewise issue for the incidental taking of any *other* species that will be encountered during the same commercial fishing activities.

The court's reconstruction of the MMPA's permitting provisions would have dramatic and, quite possibly, perverse results. The Secretary is frequently, as in this case, unable to issue a permit for the taking of all species that might be encountered during commercial fishing activities. Hence, the practical effect of the court's ruling in those instances would be to shut down large segments of commercial fishing by both domestic and foreign entities (such as the Federation in this case) in United States waters. Thousands of commercial fishermen would either have to forgo fishing altogether or be subject to huge civil penalties based, in large part, on their incidental takings of marine mammals that the Secretary has determined pose no threat to the species. In this case, for instance, the Federation would be subject to a civil penalty of $10,000 per taking for each of 6039 Dall's porpoise, even though the Secretary had concluded (and the court of appeals did not dispute) that that amount could be taken without "disadvantage" to the species.

The longer term effect of the court's ruling, moreover, could well be to disserve its intended purpose of bolstering protection of marine mammals. The decision may prompt foreign nations, such as Japan, to avoid the strictures of the MMPA by fishing outside United States waters, thus undermining the very international cooperation that Congress recognized in the MMPA as essential to the achievement of marine mammal protection. In addition, the lower court's ruling may jeopardize this nation's ongoing efforts to implement comprehensive fisheries agreements with other foreign nations, as well as preclude our issuance of permits to foreign vessels under other federal fishery management statutes. Unless Congress chooses itself to redress the court of appeals' error,[5] further review by this

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[5] As we described in our application for an extension of time within which to file this petition for a writ of certiorari and in our application for a stay pending the filing and disposition of this petition (see note 1, *supra*), Congress is actively considering amendments to the MMPA. If Congress does enact supervening legislation, further review of the court of appeals' ruling in this case may no longer be appropriate. To date, hearings have been held before both Senate and House committees to address the consequences of the decision of the court of appeals and, we are informed, amendments are being drafted for those committees' formal consideration. See *Hearings on Reauthorization of the Marine Mammal Protection Act Before the Senate Comm. on Commerce, Science and Transportation* 100th Cong., 2d Sess. (Apr. 13 and May 19, 1988); *Hearings on Reauthorization of the Marine Mammal Protection Act Before the Subcomm. on Fisheries, Wildlife Conservation and the Environment of the House Comm. on Merchant and Fisheries* 100th Cong., 2d Sess. (May 10, 1988). If this Court were to grant certiorari and Congress subsequently were to enact supervening legislation that rendered the Court's review unnecessary, the Court could then vacate the judgment of the court of appeals and remand the case to that court for reconsideration in light of the intervening legislation. See, *e.g.*, *Thomas* v. *Outboard Marine Corp.*, 479 U.S. 1002 (1986) (vacating court of appeals judgment in light of amendment of Section 104(e) of the Comprehensive Environmental

Court is needed to restore the Secretary's longstanding construction of the MMPA and reconfirm the overriding importance of judicial deference to reasonable agency construction of ambiguous statutory language.[6]

1. This Court has repeatedly described the standards for judicial review of interpretations of federal statutes by agencies charged with their administration. "If Congress has directly spoken to the precise issue in question, if the intent of Congress is clear, that is the end of the matter" (*Japan Whaling Ass'n* v. *American Cetacean Society*, 478 U.S. 221, 233 (1986); see *Amoco Production Co.* v. *Village of Gambell*, No. 85-1239 (Mar. 24, 1987), slip op. 20); *Young* v. *Community Nutrition Institute*, 476 U.S. 974, 980-981 (1986); *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984)). If, however, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute * * * " (*Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. at 843; see *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985)). The agency's construction of the

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Response, Compensation, and Liability Act, 42 U.S.C. (Supp. IV) 9604(e), by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, § 104(m), 100 Stat. 1621-1624).

[6] Review is warranted notwithstanding the absence of a circuit conflict because a conflict is unlikely to develop; all challenges to the Secretary's decision to grant a permit under the MMPA may be brought in the United States District Court for the District of Columbia (see 16 U.S.C. 1374(d)(6)). This Court has frequenly granted certiorari to review judgments in like circumstances where the consequences of the lower court's ruling were similarly of great moment. See, *e.g.*, *Amoco Production Co.* v. *Village of Gambell*, No. 85-1239 (Mar. 24, 1987); *Japan Whaling Ass'n* v. *American Cetacean Society*, 478 U.S. 221 (1986).

statutory scheme that it is entrusted to administer need not be the only "permissible" or "reasonable" construction, or even express the most "natural[ ]" or "common" reading. See *EEOC* v. *Commercial Office Products Co.*, No. 86-1696 (May 16, 1988), slip op. 7; *Japan Whaling Ass'n* v. *American Cetacean Society*, 478 U.S. at 233; *Chemical Manufacturers Ass'n* v. *Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125 (1985). Rather it need only be "sufficiently rational * * * to preclude a court from substituting its judgment for that of [the agency]" (*Young* v. *Community Nutrition Institute*, 476 U.S. at 981 (citation omitted)).

a. As Judge Starr's dissenting opinion in this case demonstrates (App., *infra*, 17a-31a), the majority opinion transgresses this Court's settled principles of judicial review by substituting its own very different construction of the MMPA for the Secretary's longstanding, reasonable construction of ambiguous statutory language that he is responsible for administering. The court did not dispute that the Secretary's construction was longstanding.[7] Nor did the court of appeals claim that the MMPA speaks directly to the issue. Indeed, the court failed to point to a

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[7] In reliance upon his interpretation, the Secretary issued general permits under the MMPA to the Eastern Pacific purse seine tuna fleet in 1977 and 1981, the Federation of Japan Salmon Fisheries Cooperative Association in 1981, and the Pacific Coast Federation of Fishermen's Association in 1984. Each of these permits did not include particular stocks or species of marine mammals known to be encountered by the fisheries either because the stocks were known to be depleted or because their population status could not be determined due to insufficient information. In a series of unpublished opinions, the United States District Court for the District of Columbia rejected legal challenges brought against several of those permits. See *Committee for Humane Legislation* v. *Kreps*, No. 77-0564 (D.D.C. 1977); *Friends of Animals* v. *Roe*, No. 80-2870 (D.D.C. July 31, 1981); *Friends of Animals* v. *Baldrige*, No. 81-1547 (D.D.C. May 18, 1982).

single provision of the Act or anything in its legislative history that directly touches on the issue here, let alone compels rejection of the Secretary's view and acceptance of the court's contrary construction.

The court of appeals instead merely relied upon general provisions of the MMPA that encourage the Secretary to act " 'in accord[ance] with sound principles of resource protection and conservation' " (App., *infra,* 10a, quoting 16 U.S.C. 1371(a)(3)(A)), and direct him to strive to reduce " 'to insignificant levels approaching zero' " the mortality of marine mammals taken incident to fishing (App., *infra,* 12a, quoting 16 U.S.C. (& Supp. IV) 1371(a)(2)). Against the background of those provisions, the court of appeals announced that the "result" of the Secretary's interpretation of his authority was contrary to the Secretary's "duty" under the Act "because it allows—subject to the civil penalty price—illegal takings of other protected marine mammals" (App., *infra,* 13a-14a).

The court's reasoning rests, however, on a misunderstanding both of the Secretary's decision and of the structure of the MMPA. Contrary to the court of appeals' repeated assertions (App., *infra,* 16a; see *id.* at 14a), the Secretary did not "allow[ ] incidental taking of various species of protected marine mammals without first ascertaining as to each such species whether or not the population of that species was at the OSP level." Nor did the Secretary "loosen MMPA requirements in order to accommodate Federation needs" (*id.* at 15a). The Secretary permitted the incidental taking only of Dall's porpoise, a species that is at or above its OSP. The Secretary, moreover, made clear that the limited scope of the permit meant that "[t]he incidental taking of northern fur seals * * * is prohibited by the [MMPA]" and "[t]he MMPA's prohibitions will be enforced" (see 52 Fed. Reg. 19875,

19878 (1987)).[8]

Hence, the full panoply of remedies provided to the Secretary would, just as they did before the issuance of the permit for the taking of Dall's porpoise, continue to apply to the Federation's unlawful taking of any northern fur seals. Contrary to the court of appeals' intimation, the Secretary's issuance of a permit for the incidental taking of Dall's porpoise in no manner diminished the severity or availability of the MMPA's sanctions for any such unlawful takings, including the imposition of civil and criminal sanctions (see 16 U.S.C. 1375) and the possible seizure and forfeiture of cargo (see 16 U.S.C. 1376). Even more fundamentally, nothing in the text, structure, or legislative history of the MMPA suggests that Congress shares the court of appeals' belief that these express remedies are not adequate to penalize or deter commercial fishing that might incidentally take a species without a permit. In particular, the MMPA does not include the additional drastic measure that the Secretary must further deter any possible taking of a depleted (and nonpermitted) species by subjecting commercial fishermen to penalties for the taking of any marine mammal, including those that are not depleted (such as the Dall's porpoise), merely because those same activities might also harm the depleted species.[9]

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[8] For this reason, the court of appeals erred in relying (App., *infra*, 14a) on Section 1371(a)(4) of the MMPA, which provides an explicit exception from the Act's moratorium for certain incidental takings by United States citizens with negligible impact on marine mammals of a species that is not depleted. That provision has no bearing, by negative implication or otherwise, on the issue in this case because the Secretary is *not* claiming that any incidental takings of northern fur seals by the Federation would be exempt from the moratorium based on their negligible impact.

[9] We do not, of course, suggest that the Secretary lacks discretion to consider the effects of commercial fishing activities on one species in

b. For reasons further elaborated in Judge Starr's dissent, moreover, the reasonableness of the Secretary's construction cannot be gainsaid. Although Congress nowhere directly addressed the issue, there is considerable evidence in the text, structure, and legislative history of the MMPA that Congress expected the Secretary, as he did in this case, to issue permits on a species-by-species basis. Nothing in the MMPA suggests that, in doing so, he must refuse to grant permits to take members of a species that is at its OSP because other species that may possibly be affected are not at that population level.

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deciding whether to issue a permit for the incidental taking of another by those same fishing activities. We acknowledge, moreover, that the Secretary's exercise of such discretion in issuing a permit is subject to judicial review, albeit of a limited nature. The Secretary contends only that the MMPA does not *compel* his denial of a permit for the taking of one species whenever a permit cannot be issued for another species potentially affected. In this case, for instance, the Secretary carefully considered the possible effects of the Federation's commercial fishing on northern fur seals and concluded that although he could not authorize incidental takings of those mammals (based on the depleted status of the Pribilof Islands stock and the absence of information concerning the Commander Islands stock), the expected neglible impact was not sufficient to warrant the Secretary's also denying the permit for the taking of Dall's porpoise, which were not themselves a depleted species. As described by Judge Starr, the Commander Islands stock appears to have remained stable even though the Soviet Union harvests between 4000 and 5500 seals each year, and only approximately 45 northern fur seals out of a stock of 210,000 on Commander Islands are likely to be taken annually by the Federation and perhaps only 10 of those seals will be killed as a consequence (see App., *infra*, 22a n.4, 25a-26a). In addition, although there was some reason to believe that perhaps 10 of the 45 might be taken from the depleted Pribilof Islands stock, its population is approximately 800,000 and hence any adverse affect on the species, while certainly unlawful, should likewise be minimal (see *id.* at 22a n.4).

Significantly, MMPA's permit provision, Section 1374, provides for "permits which *authorize the taking* or importation of any marine mammal" (emphasis added). It does not authorize fishing operations per se. Hence, contrary to the court of appeals' assertion, the Secretary's issuance of a permit in this case does not authorize the Federation's fishing operations. It merely allows a specified number of incidental takings of one type of marine mammal (Dall's porpoise) in the event that the Federation engages in those fishing operations.

As Judge Starr recognized, moreover, "[i]n sections 1373 and 1374, the statute plainly envisions that [the Secretary] will issue permits on a species-by-species basis" (App., *infra,* 19a). Section 1373(a) (emphasis added), for example, directs the Secretary to prescribe regulations "with respect to the taking and importing of animals from *each species of marine mammal* (including regulations on the taking and importing of *individuals within population stocks*) as he deems necessary and appropriate to insure that such taking will not be to the disadvantage of *those species and population stocks.*" See also 16 U.S.C. 1373(c), (d). Section 1374(b)(2)(A) (emphasis added) similarly provides that "[a]ny permit issued under this section shall * * * *specify* * * * *the number and kind of animals* which are authorized to be taken or imported." The legislative reports reflect the same understanding. See H.R. Conf. Rep. 92-1488, 92d Cong., 2d Sess. 22-23 (1972) ("The effect of the Senate amendment is to allow the Secretary to make a determination, species by species, that a waiver [of the Act's moratorium] is appropriate * * *. The conference substitute adopts the Senate approach."); H.R. Rep. 92-707, 92d Cong., 1st Sess. 18 (1971) ("Before any marine mammal may be taken, the appropriate Secretary must first * * * issue a permit which would allow that taking. In every case, the burden is placed upon those seeking permits to

show that the taking should be allowed and will not work to the disadvantage of the species or stock of animals involved."); S. Rep. 92-863, 92d Cong., 2d Sess. 5 (1972) ("[T]he best answer to questions on the conservation of marine mammals must be the application of scientific principles and knowledge separately for each species of marine mammals.").

Moreover, Congress has since implicitly endorsed the Secretary's reading. The Secretary's construction of the MMPA is, as we have noted, longstanding, and in 1981 the Secretary issued a permit authorizing the Federation to take Dall's porpoise, Steller sea lions, and northern fur seals, even though he recognized that other species—for which permits could not then issue under the MMPA—would be taken during the course of the Federation's salmon fishing; the Secretary explained then (as he did again in this case) that the unpermitted taking of those other species would lead to the imposition of civil liability. See 46 Fed. Reg. 27057, 27058 (1981). Congress was made aware of the permit and Congress itself extended the permit to June 1987 (see Fisheries Amendments of 1982, Pub. L. No. 97-389, § 201, 96 Stat. 1950-1951, codified at 16 U.S.C. 1034(b)). Hence, the permitting policy of the Secretary condemned by the court of appeals in this case was previously embraced and perpetuated by Congress. See 128 Cong. Rec. 30053 (1982) (remarks of Rep. Breaux) ("[T]his bill not only provides for the protection and better understanding of marine mammals and seabirds but further contributes to the maintenance of positive and cooperative United States-Japanese fishing relations.").

c. Finally, the Secretary's construction of the MMPA, unlike respondents' and the court of appeals', sensibly does not purport to draw a principled distinction, where there is none, between a commercial fishermen's incidental taking of a species beyond the number allowed to be taken

by a permit and his incidental taking of a species not covered by a permit in the first instance. Presumably, even under the court of appeals' view, the Secretary is not barred from issuing a permit for the incidental taking of a specified number (including age, size, or sex) of a species of marine mammal in the absence of assurances that those restrictions will not be violated. Indeed, were the rule otherwise, the issuance of a permit under the MMPA for any incidental taking would be virtually impossible because, as Judge Starr correctly observed (App., *infra,* 20a), "[f]ishing operators, even experienced ones, obviously are not endowed with sufficient prescience to know in advance the age, size, or sex of the mammals they will take in the course of their operations." The court of appeals would nonetheless impose an equivalent prohibition on the Secretary's authority to issue a permit for the taking of one kind of species in the absence of assurances that fishing operations will not adversely affect another species for which a permit may not issue.[10]

Under the Secretary's view, both types of transgressions are, quite reasonably, treated the same. The Act's penalty provisions apply in like fashion to a commercial fisherman's taking of a species in a quantity exceeding that authorized by a permit or his taking of a species not covered by the permit. The Secretary is not automatically barred at the outset from issuing a permit notwithstanding the possible occurrence of a subsequent violation of either type. The Secretary may instead carefully consider the extent of the risks, including the anticipated harm of either type of

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[10] The only exception to the court of appeals' blanket prohibition is an extremely narrow one, providing that "the Act may not prohibit issuance of a permit where there is only a very remote possibility that marine mammals for which an [OSP] has not been determined may be taken incidental to commercial fishing * * * " (App., *infra,* 12a).

possible violation to the species affected, and validly conclude that although a permit for the taking of either a greater number or a certain kind of marine mammal is not warranted, a permit should nonetheless issue for a lesser number or a different kind of species.[11]

2. Review is also warranted because the court of appeals' decision, if not corrected, would be likely to have a devastating effect on this nation's fishing industry as well as upon foreign nationals who seek to fish in waters subject to the jurisdiction of the United States.[12]

Most immediately, the lower court's decision has prevented the Federation from fishing in United States' waters during the 1988 salmon season (June 10th through July 31st). The decision would, as a practical matter, similarly bar the operation of major domestic fishing operations. The Pacific Coast Federations of Fishermen's Associations, for example, currently holds a general permit authorizing its members to take more than 2900 individuals of non-depleted species or stocks of marine mammals in the course of fishing activities. Consistent with the court of appeals opinion, that permit cannot be renewed upon its expiration on December 31, 1988, be-

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[11] Of course, the Secretary may determine that the risk of transgression either in terms of the kind or quantity of marine mammals that might be taken is so great that no permit should issue at all (see note 9, *supra*), or should be issued, but based upon certain conditions deemed appropriate by the Secretary (see 16 U.S.C. 1374(b)(2) (D)). In this case, however, the Secretary determined that the associated risks were minimal (see 52 Fed. Reg. 19878 (1987)).

[12] Because of these consequences, both House and Senate committees have held hearings to consider proposals for corrective legislation that would, in effect, overturn the court of appeals' ruling in this case. It is our understanding that those committees are now in the early stages of drafting legislative proposals for possible congressional consideration and enactment (see note 5, *supra*).

cause the covered fishing activities incidentally take small numbers of northern fur seals and northern (Steller) sea lions, which are two species of marine mammals that are thought to be depleted. Hence, the membership of the Pacific Coast Federations of Fishermen's Associations will thenceforth have to forgo fishing altogether or be subject to civil liability for penalties of $10,000 for each marine mammal of *any* species that is taken (see 16 U.S.C. 1375(a)(1)), even though the vast majority of these penalties would be imposed for taking individual mammals from species or stocks, such as the California sea lion, that are abundant. Such a harsh result cannot be squared with the legislative compromise struck by Congress in the MMPA, requiring the Secretary to "give full consideration" to "the conservation, development, and utilization of fishery resources" in regulatory actions (16 U.S.C. 1373(b)(4)).

The court of appeals' misreading of the MMPA likewise merits review because, ironically, it may pose the greater threat to the protection of marine mammals by undermining international cooperative efforts that Congress deemed essential for the protection of those animals. The Department of State has indicated that Japan may ultimately respond to the decision below by seeking to reopen the 775,000-square-mile area lying outside United States' waters that currently is closed to its fishermen pursuant to an international agreement (see note 2, *supra*), and where stocks of migrating United States and Canadian salmon are found. If Japan does, Japanese interception of salmon of United States origin could dramatically increase, leading to severe losses for domestic salmon fishermen. It would also likely lead to increased mortality for marine mammals because Japan would not, of course, be subject to the MMPA outside United States waters and because the Japanese fleet almost certainly would exclude the

United States scientists who currently monitor incidental takes of marine mammals from Japanese vessels in United States waters. It would likewise diminish the incentive for the Japanese fleet to adopt new fishing gear or techniques to reduce porpoise mortality (see 16 U.S.C. 1034(a)).

Finally, the question presented is important because the court of appeals' decision may have far-reaching effects beyond those on the Japanese salmon fishery at issue in this case and on similarly situated domestic fishermen. The Department of Commerce informs us that the decision may compromise ongoing efforts to implement a comprehensive fisheries agreement with the Soviet Union. The court's decision may also preclude the award of permits to foreign fishermen for operations in East Coast mackerel fisheries under the Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1601 *et seq.*, because that Act requires foreign fishermen to possess permits under other federal fishery laws, including the MMPA (see 16 U.S.C. 1853(a)(1)(C)).

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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SEPTEMBER 1988

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-5239

KOKECHIK FISHERMEN'S ASSOCIATION, ET AL.

v.

SECRETARY OF COMMERCE, ET AL.

FEDERATION OF JAPAN SALMON FISHERIES COOPERATIVE ASSOCIATION, APPELLANT

AND CONSOLIDATED CASE Nos. 87-5240, 87-5241, 87-5242, 87-5243, 87-5248 AND 87-5249

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
(CIVIL ACTION Nos. 87-01440, 87-01472 AND 87-01351)

Argued November 3, 1987
Decided February 16, 1988

Before: *RUTH B. GINSBURG and STARR, Circuit Judges, and GESELL**, *District Judge.*

Opinion for the Court filed by District Judge GESELL.

Dissenting opinion filed by *Circuit Judge* STARR.

GESELL, *District Judge*: This case requires us to examine an aspect of this nation's announced policy to protect, in waters under its jurisdiction, marine mammal populations that are in danger of depletion or extinction.

Following formal rulemaking proceedings, the Secretary of Commerce issued a regulation[1] pursuant to the Marine Mammal Protection Act of 1972 ("MMPA"), 16 U.S.C. §§ 1361-1407 (1982 & Supp. III 1985), authorizing a group of Japanese commercial fishermen known as the Federation of Japan Salmon Fisheries Cooperative Association ("Federation") to take a fixed number of Dall's

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* Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a).

[1] Regulations Governing the Taking and Importing of Marine Mammals, 52 Fed. Reg. 19,874 (1987).

porpoise incidental to commercial fishing for salmon in U.S. conservation waters. The permit application was opposed at the administrative level by environmentalists, the Center for Environmental Education, *et al.* ("CEE") and by a group of Alaskan commercial fishermen, Kokechik Fishermen's Association, *et al.* ("Kokechik"). As finally authorized on May 22, 1987 after several amendments, the permit failed to meet objections advanced during the rulemaking process by Kokechik and CEE, on one side, and the Federation on the other side.

Shortly after the Secretary's final decision, the Federation, Kokechik and CEE filed petitions for review of the permit in the U.S. District Court for the District of Columbia, as authorized by the statute, 16 U.S.C. § 1374(d)(6). On June 10, 1987, the three cases were consolidated by the District Court and a hearing held on the motions for preliminary injunction filed by the three parties. After careful consideration, the District Court granted the motions of petitioners Kokechik and CEE on June 15, 1987, and thus preliminarily enjoined the Secretary of Commerce from issuing a permit to the Federation; the Federation's motion was thereupon dismissed as moot. *Kokechik Fisherman's Ass'n. et al. v. Malcolm Baldridge, et al.*, __ F. Supp. __ (D.D.C. 1987). Appellants Federation and Secretary of Commerce then filed a notice of appeal in this Court on June 25, 1987.

Because a question of pure statutory interpretation controls our review of the District Court's order, and its final resolution is essential, we turn immediately to this decisive issue. *See NRDC v. Morton,* 458 F.2d 827, 832 (D.C. Cir. 1972). Perceiving the issue as the District Court preliminarily suggested it should be decided, we affirm and remand to the District Court only for such further proceedings consistent with this decision as may be required.

BACKGROUND

In 1952, the United States, Japan and Canada signed the International Convention for the High Seas Fisheries of the North Pacific Ocean ("INPFC"). 4 U.S.T. 380, T.I.A.S. No. 2786. Under this treaty, Japan agreed to refrain from fishing for salmon in certain areas of the North Pacific Ocean and in the Bering Sea. In 1978, the INPFC was renegotiated to bring the treat in conformity with the recent adoption by the United States of a 200 mile Fisheries Conservation Zone, now known as the Exclusive Enterprise Zone ("EEZ"). 30 U.S.T. 1095, T.I.A.S. No. 9242. The protocol amending the treaty permitted the Japanese to fish for salmon inside the U.S. EEZ. *Id.* The North Pacific Fisheries Act of 1954 ("NPFA"), implementing the INPFC, was also amended in 1978 and exempted Japanese commercial salmon fishing from the strictures of the MMPA until June 9, 1981. 16 U.S.C. § 1034(b) (1976 & Supp. II 1978). The NPFA further provided that after June 9, 1981 the restrictions of the MMPA would apply with full force and effect to Japanese salmon fishing within the EEZ. *Id.* § 1034(c).

In 1981, the National Oceanic and Atmospheric Administration ("NOAA"), acting pursuant to section 1374 of the MMPA, issued the Federation a three year general permit allowing its members an annual take of 5,500 Dall's porpoise, 450 northern fur seas, and 25 northern sea lions incidental to their commercial salmon fishing. Takings of Marine Mammals Incidental to Commercial Fishing Operations, 46 Fed. Reg. 27,056 (1981). Congress then extended this permit in 1982 by amendments to the North Pacific Fisheries Act on the condition that further research be performed examining ways to reduce or avoid incidental takings of marine mammals during salmon gillnet fishing. 16 U.S.C. § 1034(b) (1982). The permit was sched-

uled to expire on June 9, 1987 and without either Congressional extension of the permit or the issuance of a new general permit, the Federation's commercial salmon fishing within the U.S. EEZ would effectively cease at that time.

On July 21, 1986, the National Marine Fisheries Service ("NMFS"), a division of NOAA, received an application from the Federation for a five year general permit under the MMPA which essentially sought an extension of the previous permit's terms through June 9, 1992. As required by the MMPA, NMFS NOAA published in the *Federal Register* a notice of receipt of the application, the proposed regulation based on the application and the scheduling of formal rulemaking hearings, along with the procedures to be used and issues to be examined at the hearings. Regulations Governing the Taking and Importing of Marine Mammals, 51 Fed. Reg. 29,674 (1986). In addition, included in the notice were statements required under section 103(d) of the MMPA concerning the status of each marine mammal stock affected and the effects of any permitted taking on its optimum sustainable population ("OSP").[2] 16 U.S.C. § 1373(d). A Draft Environmental Impact Statement was also issued shortly thereafter by the Environmental Protection Agency. No statements were published relating to northern sea lions because only one had been reported taken since the general permit was issued in 1981 and the NMFS considered the probability of other incidental takings too remote to warrant its concern. In addition, it was noted that northern fur seas from the Pribilof Islands could not be included in the proposed

[2] The term "optimum sustainable population", as defined in 50 C.F.R. § 216.3 (1986), means "a population size which falls within a range from the population level of a given species or stock which is the largest supportable within the ecosystem to the population level that results in maximum net productivity."

permit regulation because of a separate agency action to list the stock as depleted, thereby precluding issuance of a taking permit under the MMPA.[3] Thus, the proposed regulation dealt solely with the incidental taking of Dall's porpoise.[4]

On December 1-7, 1986, a formal rulemaking hearing on the permit request and proposed regulation was held before an Administrative Law Judge ("ALJ") of the United States Department of Commerce. After careful consideration of a voluminous record, the ALJ recommended issuance of a five year permit to the Federation allowing the incidental taking of 1,750 Dall's porpoise during 1987 with a 5% yearly reduction over the following four years, and 45 northern fur seals annually.[5] The decision to recommend the inclusion of northern fur seals was arrived at during the course of rulemaking when it was learned that the Federation was seeking permission to take northern fur seals from the Commander Island stock, not from the Pribilof Island stock which was thought to be depleted.[6] The ALJ also noted that sea lions, harbor por-

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[3] The NMFS proposed to designate the Pribilof Island population of North Pacific fur seals as depleted under the MMPA on Decmeber 22, 1986. North Pacific Fur Seal—Pribilof Island Population; Designation as Depleted, 51 Fed. Reg. 47,156 (1986).

[4] The initial proposed rule would have permitted the annual incidental taking of 5,500 Dall's porpoise. 51 Fed. Reg. 29,674, 29,675 (1986).

[5] Subsequent to the ALJ's recommendations, the NMFS published a notice of amendment to the proposed rule which would have permitted the Federation to take annually up to 450 northern fur seals incidental to commercial fishing. Regulations Governing the Taking and Importing of Marine Mammals, 52 Fed. Reg. 2,566 (1987).

[6] At the time the application was received and the initial proposed regulation noticed, the NMFS believed that the permit sought permission to take northern fur seals from the Pribilof Island stock, not from the Commander Island stock. 51 Fed. Reg. at 29,676.

poise, Pacific white-sided dolphin, northern right whale dolphin, and killer whales are incidentally, although infrequently, taken during salmon gillnet fishing and that the Federation had applied in its permit for the taking of northern sea lions. The ALJ concluded that since there was virtually no scientific data on the record concerning these species, either because the Federation had not applied for such takings in its permit or the NMFS had not included them in the Federal Register notice,[7] the Federation was prohibited from taking these species.[8] In addition, the ALJ made findings and recommendations relating to the terms and conditions attaching to the permit and further research needs.

Pursuant to rulemaking procedures, the Secretary then reviewed the record developed during the formal hearings, the ALJ's recommended decision, the exceptions filed thereto, and the Final Environmental Impact Statement, and issued a final decision. The final rule provided for a general permit to be issued under the MMPA to the Federation allowing "an aggregate taking during the three year permit period of no more than 789 Dall's porpoise in the Bering Sea and 5,250 in the North Pacific Ocean, of which no more than 2,494 may be taken from the North Pacific Ocean in any single calendar year." Regulations

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[7] Although the Federation requested a taking quota for northern sea lions, the original proposed rule did not include this species because the NMFS believed that the probability of incidental taking of northern sea lions was too remote to warrant consideration. *Id.*

[8] The Secretary in his 1981 final decision authorizing the issuance of a permit to the Federation ruled that "[t]he permit and regulations allow no takings of harbor porpoises, Pacific white sided dolphin or killer whale. Takings of these marine mammals are in violation of and subject to prosecution under the MPA." 46 Fed. Reg. 27,056, 27,058 (1981). That permit, however, did allow for the annual taking of 25 northern sea lions.

Governing the Taking and Importing of Marine Mammals, 52 Fed. Reg. 19,874 (1987). With regard to the northern fur seals, the Secretary determined that an incidental take permit could not be issued under the MMPA because insufficient information existed on the record to ascertain whether the Commander Island population was at the minimum level of its optimum sustainable population. *Id.* at 19,875. Further, he ruled that the "incidental taking of northern fur seals, like the taking of northern (Steller) sea lions, harbor porpoise, Pacific white-sided dolphin, northern right whale dolphin, and killer whales is prohibited by the Marine Mammal Protection Act." *Id.* at 19,878.[9]

ANALYSIS

The Federation's commercial salmon fishing in the U.S. EEZ is conducted with the use of gillnets. Gillnet fishing involves setting out nylon nets approximately nine miles long and 26 feet deep at dusk using small fleets of motor boats. The nets drift freely near the surface where salmon and marine mamals, primarily Dall's porpoise, feed during

[9] The Secretary believed that the Federation was trapped in unfortunate circumstances by the strictures of the MMPA. After reviewing the record, he felt that only a negligible number of mammals, in terms of impact on the species and stocks, not covered by the permit would be incidentally taken and that some of these mammal stocks did not "require the absolute protection provided by the MMPA." 52 Fed. Reg. at 19,878. Therefore, the Secretary felt that civil penalties in these circumstances served no useful purpose and intended to "seek amendment of the MMPA to permit incidental, but not intentional, takings of small numbers of marine mammals, by vessels engaged in commercial fishing, if such takings will have a negligible impact on the species and stocks." *Id.* This type of exemption for incidental, but not intentional, takings having a negligible impact on the species involved is currently limited to citizens of the United States. *See* 16 U.S.C. § 1371(a)(4)(A).

the night. These fish and mammals become ensnared in the drifting nets. The next morning motor boats retrieve the nets and haul in whatever catch has been ensnared in the nets.

As is readily apparent, this method of fishing does not permit discrimination between which species of fish and mammals will be ensnared and which will not. Consequently, although the Federation actively seeks to catch only salmon, marine mammals protected by the MMPA end up as unintentional victims of salmon gillnet fishing because of the nature of the fishing gear and techniques used. This result is absolutely prohibited by the MMPA unless, pursuant to the requirements of the Act, the Secretary of Commerce specifically grants permission for the taking of marine mammals incidental to commercial fishing.[10] 16 U.S.C. § 1371(a)(2).

The permit at issue here grants the Federation permission to take a specified quota of Dall's porpoise incidental to commercial gillnet salmon fishing. No other marine mammal species are included within the permit. Although Dall's porpoise is the protected marine mammal primarily affected by the Federation's fishing, it is foreseeable that takes of northern fur seals, northern sea lions, harbor porpoises, Pacific white-sided dolphins and killer whales will occur. Since the taking of any of these other marine mammals without a permit is absolutely prohibited by the MMPA, the legitimacy of the permit issued here comes under scrutiny. The MMPA must be analyzed to determine whether the Secretary of Commerce may legally issue a permit allowing incidental taking of one protected

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[10] The Secretary defines the term "incidental catch" to include the taking of a marine mammal "as a consequence of the steps used to secure the fish in connection with commercial fishing operations" 50 C.F.R. § 216.3 (1986).

marine mammal species knowing that other protected marine mammal species will be taken as well.

Congress, by enacting the MMPA, put into effect a moratorium on the taking of marine mammals. The term "moratorium" is defined by the Act to mean "a *complete cessation* of the taking of marine mammals. . . ." 16 U.S.C. § 1362(7) (emphasis added).[11] Since June 9, 1981, this moratorium has applied to Japanese commercial fishing in the U.S. EEZ. Section 1377 of the MMPA requires the Secretary of Commerce to enforce the provisions of the Act and implementing regulations promulgated thereunder.

Under a limited exception to this moratorium, the taking of marine mammals incidental to commercial fishing operations may be allowed. 16 U.S.C. § 1371(a)(2). Before such a permissible taking can occur under this exception, two statutory requirements must be met; the taking must be authorized by regulations promulgated through formal rulemaking proceedings and a permit issued by the Secretary of Commerce; the taking must meet the requirements of the MMPA and be consistent with the primary goal of protecting marine mammals. *See id.*

Under the MMPA, before a permit authorizing a taking may be issued, the Secretary "must be assured that the taking . . . is in accordance with sound principles of resource protection and conservation as provided in the purposes and policies of this chapter. . . ." 16 U.S.C. § 1371(a)(3)(A). The guiding principles of resource protection and conservation are set out in 16 U.S.C. §§ 1361(2) and 1361(6). Section 1361(2) provides:

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[11] In turn, the Act defines "take" to mean "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." 16 U.S.C. § 1362(12). The Secretary further interprets the term "harass" to include "the restraint or detention of a marine mammal, no matter how temporary." 50 C.F.R. § 216.3 (1986).

> [Marine mammal] species and population stocks should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part, and, consistent with this major objective, they should not be permitted to diminish below their optimum sustainable population. . . .

Section 1361(6) reads in relevant part as follows:

> [I]t is the sense of Congress that [marine mammals] should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management and that the primary objective of their management should be to maintain the health and stability of the marine ecosystem. Whenever consistent with this primary objective, it should be the goal to obtain an optimum sustainable population keeping in mind the carrying capacity of the habitat.

Thus, it is clear that "[t]he Act was to be administered for the benefit of the protected species rather than for the benefit of the protected species rather than for the benefit of commercial exploitation." *Committee for Humane Legislation, Inc. v. Richardson,* 540 F.2d 1141, 1148 (D.C. Cir. 1976).

Consonant with these principles, the MMPA provides a scheme to determine the *number* and *kind* of marine mammals which can be taken incidental to commercial fishing operations. Under this scheme, the Secretary is obligated to determine that the permit applicant has carried its burden of providing that the taking sought does not disadvantage the species involved and is consistent with the policies and purposes of the Act. The Secretary, thus, must first determine that the requested taking will not be to the disadvantage of the affected species and population

stocks. 16 U.S.C. § 1373(a). Pursuant to this determination and in conjunction with the formal rulemaking proceedings, the Secretary must publish statements on population levels and the expected impact of the proposed regulations on the optimum sustainable population of the affected marine mammal species. 16 U.S.C. § 1373(d). Any decision the Secretary makes must be consistent with the MMPA "immediate goal" that

> the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishery operations be reduced to insignificant levels approaching zero mortality and serious injury rate. . . .

16 U.S.C. § 1371(a)(2).

While the Act may not prohibit issuance of a permit where there is only a very remote possibility that marine mammals for which an optimum sustainable population has not been determined may be taken incidental to commercial fishing, such a situation is clearly not the case here. In its original permit application the Federation requested that 450 fur seals be allowed to be taken annually incidental to commercial salmon fishing in the U.S. EEZ.[12] Although there were indications the taking might be less, it is readily apparent that the taking of these marine mammals is not merely a remote possibility but a certainty.[13]

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[12] NMFS's regulations require that all applications for a general permit to take marine mammals incidental to commercial fishing operations include:

> A statement identifying the marine mammals and numbers of marine mammals which are *expected* to be taken under the general permit.

50 C.F.R. § 216.24 (emphasis added).

[13] When he granted the permit to the Federation the Secretary was informed and knew that species of marine mammals other than Dall's

In his final decision, the Secretary concluded that it was not possible to make the required finding that the northern fur seal population from the Commander Island stock is within its optimum sustainable population level. The Secretary found the evidence unclear and that a "significant dispute" existed as to whether it was above the minimum level of its optimum sustainable population. It could not be determined, therefore, that this protected stock would not be disadvantaged by takings incidental to the Federation's fishing operations in the U.S. EEZ. As to the Pribilof Island population, the Secretary found it was depleted. Thus, in neither case could findings which are an absolute requirement for the issuance of a permit and waiver of the MMPA be made.[14] Yet the Secretary, despite his inability to determine whether and to what extent northern fur seals would be disadvantaged by the Federation's fishing operations, issued the permit taking the position that as long as it did not authorize the taking of northern fur seals he had complied with the MMPA. The result was, in effect, that the permit allowed the Federation to take protected marine mammals for a price—the civil penalties imposed for such takings.

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porpoise, a species at the OSP level, would inevitably be taken incidental to the Federation's salmon fishing operations. These included northern fur seals from the Pribilof Island stock, a depleted species protected under the MMPA, as well as other species as to which no OSP finding one way or the other had been made—northern fur seals from the Commander Island stock, harbor porpoise, northern right whole dolphin, Pacific white-sided dolphin, and other dolphin, as well as various sea lions.

[14] It is necessary to know the OSP in order to determine whether or not an activity will "disadvantage" the marine mammals involved. Therefore, Congress required the Secretary to act only on the basis of the very knowledge which he admits is unknown: the effect of any proposed taking on optimum sustainable population levels.

This is a result that the MMPA does not countenance. The MMPA effects a moratorium on the taking of marine mammals. Congress decided to undertake this decisive action because it was greatly concerned about the maintenance of healthy populations of all species of marine mammals within the ecosystems they inhabit. Exceptions to this moratorium clearly evidence a concern with the relationship between the activity engaged in and its effect on marine mammals and their ecosystem. It is the duty of the Secretary to take a systemic view of an activity's effect on marine mammals. A view that the permit process functions merely to determine which takes will be exempted from civil penalties is inconsistent with this duty because it allows—subject to the civil penalty price—illegal takings of other protected marine mammals.

The Secretary has no authority, by regulation or any other action, to issue a permit that allows conduct prohibited by that Act. Nonetheless, the Secretary chose to disregard these incidental takings as "negligible," an undefined and ambiguous standard at best. The MMPA, however, does not provide for a "negligible impact" exception to its permitting requirements where incidental takings are not merely a remote possibility but a certainty.

As enacted, section 1371(a)(4) creates a narrow exception for incidental, but not intentional, takings having a negligible impact on the species involved "by citizens of the United States while engaging in commercial fishing operations, ..." The Secretary is not authorized to extend this flexibility to the Japanese nor is he authorized to create a new undefined statutory exception under the heading of "negligible," which clearly has the effect of avoiding the strictures of the MMPA and congressional intent. Practical considerations or unavailability of information is no excuse. If the Secretary believes the Act needs

amendment, then it is Congress he must address. The horse must stay ahead of the cart.

Furthermore, Congress has provided one statutory relaxation of the MMPA's otherwise strict moratorium on takings except as authorized in section 1371(a). Section 1371(a)(2) was amended in 1981 to read:

> In any event it shall be the immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero serious injury and mortality rate: provided that his goal shall be satisfied in the case of the incidental taking of marine mammals in the course of seine fishing for yellowfin tuna by a continuation of the application of the best marine mammal safety techniques and equipment that are economically and technologically practicable.

No similar language was included in the 1982 amendment of section 1034, which reauthorized the Federation permit for 1984-87. It thus appears that Congress did not intend to loosen MMPA requirements in order to accommodate Federation needs, as it did for the tuna industry.

The MMPA does not allow for a Solomonic balancing of the animals' and fisheries' interests such as the Secretary attempted.[15] The interest in maintaining healthy populations of marine mammals comes first and the Secretary cannot ignore the fur seals. He can include the northern fur seals in the permit only if he makes the requisite find-

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[15] In *Committee for Humane Legislation, Inc. v. Richardson,* this Court stated that the "[b]alancing of interests . . . is entirely a legislative decision, dictated at present by the terms of the Act." 540 F.2d at 1151 n.39. Thus, the Secretary's concern for potential harm to Japanese commercial fishing of our system of international treaties should be addressed to Congress.

ings. Lacking such findings the permit cannot issue. Moreover, he may not allow the Federation merely to pay a price for taking protected marine mammals; and he must face up to the taking of other marine mammals the record shows will also inevitably occur if gillnet fishing is permitted.

CONCLUSION

Thus, we hold that the permit, as granted to the Federation, is contrary to the requirements of the MMPA in that it allowed incidental taking of various species of protected marine mammals without first ascertaining as to each such species whether or not the population of that species was at the OSP level. If it is appropriate to grant foreign commercial fishermen some leeway to take marine mammals incidentally in carrying out their commercial fishing operations for salmon, it is for the Congress, not the Secretary to decide. Past administrative practice that is inconsistent with the purpose of an act of Congress cannot provide an exception and the moratorium must still be fully upheld in this situation. *See FEC v. Democratic Senatorial Campaign Committee,* 454 U.S. 27, 32 (1981).

Affirmed and remanded for further proceedings consistent with this decision.

STARR: *Circuit Judge, dissenting*: This case arises out of the faraway, frigid waters of the Bering Sea. There, fish abound in waters where interests of the United States, the Soviet Union, and Japan coincide and, at times, conflict. Not only are the great commercial fishing powers present, with motherships and fleets of catcher boats plying their trade; also present are creatures, some based on land, some at sea, known as marine mammals. Marine mammals, like mother ships and catcher boats, fish for their living as well. And in the robust waters of the North country, commercial fishing nets and marine mammals at times, indeed inevitably, come into contact. The issue before us concerns the welfare of marine mammals caught up, quite literally, in the nets of ships of commerce and trade.

Notwithstanding the unusual setting of this case, the question presented to us is the workaday one of statutory construction. In rejecting the common-sense reading of the statute adopted by the agency charged with administering it, the court reaches a result that, in my judgment, Congress never contemplated. In my view, today's decision is unsupported by the text, structure, or legislative history of the statute. I therefore respectfully dissent.

I

Under now-familiar principles, the task before us in construing a statute administered by an agency of the Executive Branch is clear. First, if Congress has addressed the precise issue in question, and the intent of Congress is clear, it is the judiciary's duty to give effect to that Congressional determination. *See NLRB v. United Food and Commercial Workers Union,* 108 S. Ct. 413, 421 (1987); *Japan Whaling Ass'n v. American Cetacean Society,* 106 S. Ct. 2860, 2867 (1986); *Chevron, U.S.A. v. NRDC,* 467

U.S. 837, 842-43 (1984). If, on the other hand, the statute is silent or ambiguous with respect to the inquiry at issue, we are obliged under settled principles of law to defer to the agency's construction, if reasonable, of that statute. *United Food,* 108 S. Ct. at 421; *Japan Whaling Ass'n,* 106 S. Ct. at 2868; *Chevron,* 467 U.S. at 844.

It is abundantly clear that Congress did not speak in so many words to the precise issue that the court decides today: whether the National Oceanic and Atmospheric Administration ("NOAA"), which is charged with administering the Marine Mammal Protection Act, 16 U.S.C. § 1361 (1982) *et seq.* ("MMPA"), is prevented from issuing a permit for one species because other species, for which a permit cannot lawfully issue, would inevitably be taken. Although the text of the statute does not provide a definitive answer to this question, the overall statutory scheme contemplates precisely the construction given by NOAA. In the MMPA, Congress created a species-based permit system that would enable fishing operations to carry on. The court's critical interpretive error, I believe, lies in its failure to give meaningful content to the species-based permit system established by Congress as an essential part of the legislative compromise embodied in the MMPA, a compromise evidenced by, on the one hand, the moratorium on the taking of marine mammals and, on the other hand, the system of permits for taking marine mammals in the course of fishing operations. By virtue of its interpretive approach, the court ultimately embraces a result that is so counter-intuitive that one must in conscience wonder whether a reasonable Congress would have desired the odd outcome of calling a complete halt to important fishing operations with clear foreign policy implications.[1]

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[1] The Federation of Japan Salmon Fisheries Cooperative Association ("Federation") estimates that its fishing operations involve

A

In the same section of the MMPA enacting the moratorium on takings, section 1371(a)(2) makes the permit system an integral part of the overall statutory scheme:

> Marine mammals may be taken incidentally in the course of commercial fishing operations and permits may be issued therefor under section 1374 of this title subject to regulations prescribed by the Secretary in accordance with section 1373 of this title.

This language contemplates the incidental taking of marine mammals as long as certain statutory requirements are met. The noncasual reader will have noticed that section 1371(a)(2) makes reference to two other sections of the MMPA: section 1373, which charges NOAA with developing regulations governing the taking of marine mammals; and section 1374, which confers authority on NOAA to issue permits in accordance with certain statutory guidelines.

In sections 1373 and 1374, the statute plainly envisions that NOAA will issue permits on a species-by-species basis. For example, section 1373(a) directs NOAA to "prescribe . . . regulations with respect to the taking . . . of animals from each species of marine mammal. . . ." Section 1374(b)(2)(A) provides that "[a]ny permit issued under this section shall specify the number and kind of animals which are authorized to be taken or imported."

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employment of approximately 51,861 people, including those engaged in distribution and processing associated with the industry. Statement of Shintaro Enomoto, Appendix of Appellant ("Appellant App.") at 349. The Federation calculated that it would have incurred losses in preparatory expenditures amounting to over $40 million had the District Court not stayed its temporary injunction for 20 days, thereby allowing fishing operations in the 1987 season. Affidavit of Shintaro Enomoto, Appellant App. at 59.

Finally, section 1373(c) authorizes NOAA to promulgate regulations that restrict the age, size, or sex of the marine mammals for which a permit may issue. Fishing operators, even experienced ones, obviously are not endowed with sufficient prescience to know in advance the age, size, or sex of the mammals they will take in the course of their operations: as a result, a moment's reflection suggests that *this provision necessarily means that operators will take some marine mammals even though a permit for that taking has not issued.* This is, of course, precisely how NOAA has interpreted the measure.[2]

The record thus suggests that Congress contemplated a situation in which NOAA would lawfully issue a permit for one species while at the same time denying a permit for another species that would inevitably be taken in the same fishing activity because the applicant had failed to jump through one of the MMPA-erected hoops, *see supra* note 2. In fact, in issuing its first General Permit to the Federation of Japan Salmon Fisheries Cooperative Association ("Federation"), NOAA observed that "the Japanese sal-

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[2] These provisions impose upon NOAA an obligation to make specific, affirmative findings with respect to *each* species for which a permit is issued before NOAA can issue a permit for the taking of that species. NOAA must ascertain the "existing levels of the species and population stocks" of the mammals to be taken, the optimum sustainable population ("OSP") of those mammals, and the impact of the takings of the OSP on the species, § 1373(d); *see also Committee for Humane Legislation v. Richardson,* 540 F.2d 1141, 1149-50 (D.C. Cir. 1976). In making these assessments, NOAA must conduct hearings on the record, § 1373(d), and report to Congress annually on "the current status of all marine mammal species and population stocks" covered by the MMPA. § 1373(f). And, as an overriding concern in the permit structure, NOAA must assure that any permitted takings "not be to the disadvantaged of those species." § 1373(a). Only if NOAA has jumped through each of these statutory hoops, among others, can it issue a permit for the taking of a particular species.

mon fishery expects to take incidentally on a yearly basis in the U.S. [Exclusive Economic Zone ("EEZ")]" 5,500 Dall porpoise, 50 harbor porpoise, 25 Pacific white-sided dolphins, 25 killer whales, 25 Steller sea lions, and 450 northern fur seals. 46 Fed. Reg. 27057 (1981), Appellant App. at 402. *Even though the agency recognized that all these various species of mammals would be taken in the Federation's operations,*[3] *NOAA issued permits for only three species*: Dall porpoise, Steller sea lions, and northern fur seals. NOAA explained that it had not yet been able to conduct the formal review necessary for a permit to issue under the Act for the other species, and that the "permit covering harbor porpoise, Pacific white-sided dolphin and killer whale remains unprocessed." *Id.* Instead, NOAA made clear, "[t]he permit and accompanying regulations allow no takings of harbor porpoise, Pacific white-sided dolphin, or killer whale. Takings of these marine mammals are in violation of and subject to prosecution under the MMPA." *Id.* at 27058, Appellant App. at 403. It is *this* permit, which assumed that other, nonpermitted mammals would also be taken (notwithstanding the moratorium), that Congress itself extended in amending the North Pacific Fisheries Act of 1954, 16 U.S.C. § 1021 *et seq.* ("NPFA"). History thus teaches us that both Congress and the agency charged with administering the MMPA contemplated that permits would be issued in circumstances in which nonpermitted takings would inevitably occur.[4]

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[3] To borrow the language of the court, the agency knew this to be "not merely a remote possibility but a certainty." Maj. op. at 12; *see also* Maj. op. at 12 n.13.

[4] Appellees place particular emphasis on the nonpermitted takings of fur seals. There is some controversy among the parties about the number of fur seals likely to be taken in the Japanese salmon fishery. Despite some hints in the court's opinion to the contrary, Maj. op. at

5-6, the issue was fully joined in administrative proceedings below. Two different population stocks are at issue, namely, fur seals from the Pribilof Islands in the eastern Bering Sea off Alaska and fur seals from the Commander Islands in the Soviet Union.

Appellants do not appear to contest NOAA's determination that the Pribilof fur seals are legally depleted. *See* Reply Brief of Appellant Federation of Japan Salmon Fisheries Cooperative Association at 19 n.24; Reply Brief of Federal Appellants at 4-5. The ALJ found that the Pribilof population had declined "from 1.8 million or thereabouts to something less than half of that over a period of ten or fifteen years." Recommended Decision of Hugh J. Dolan, Administrative Law Judge ("ALJ Decision") at 33, Appellant App. at 285. According to the ALJ, the population continues to decline at a rate of roughly 6.5% per year. *Id.* NOAA's proposed rule designating Pribilof fur seals as depleted estimated that their population had declined from 1.3 million in the late 1970's to 871,000 in 1983, a decline of one-third in less than a decade. 51 Fed. Reg. 47158 (1986), Appellant App. at 315. NOAA also estimated current [1986] population at 800,000. *Id.* An important cause of the decline in Pribilof fur seal population was found to be entanglement in *discarded* nets and debris, rather than set nets used in actual operations. *Id.* at 47159, Appellant App. at 316.

In contrast to the stock of Pribilof fur seals, the ALJ found the stock of Commander fur seals to be stable, if not increasing, and estimated the current population at 210,000. ALJ Decision at 33, Appellant App. at 285. The ALJ also noted that the stock sustains a harvest by the Soviet Union of about 4,000 to 5,500 fur seals annually. *Id.* at 34, Appellant App. at 286.

The court implies that as many as 450 fur seals might be taken in the Federation's fishing operations. *See* Maj. Op. at 12 n.12. The agency's determination, however, was squarely to the contrary. The Federation estimated that the take of all fur seals would amount to an average of 45 per year. The ALJ accepted this figure and found it *de minimis*. *Id.* The Environmental Impact Statement ("EIS") also adopted this 45/year figure. EIS at 66, Appellant App. at 217.

Of these 45 fur seals likely to be taken annually, the ALJ calculated, as a matter of mathematical probability, that 10 would be taken from the Pribilof Island stock and that one out of those 10 would die. ALJ Decision at 35, Appellant App. at 287. *There was, however, no direct evidence of even a single fur seal from the Pribilof stock ever having been taken.* The ALJ's estimates were based on mathematical probabilities only.

Indeed, the legislative history of the statute buttresses the view that Congress considered and rejected a blanket prohibition on marine mammal takings in favor of a system of regulated takings within a permit structure. In debates on the Senate floor, Senator Ernest Hollings, in his capacity as Chairman of the Subcommittee on Ocean and Atmosphere of the Committee on Commerce and manager of the bill on the Senate floor, rejected the call for an "immediate ban on the taking of any and all marine mammals." 118 Cong. Rec. 25253 (July 25, 1972). Subsequently, in oversight hearings two years after the Act's passage, Congressman Dingell reaffirmed that "[i]t was not our intention that commercial fishing would be brought to a halt." Hearings on Oversight of the Marine Mammal Protection Act of 1972 before the Subcommittee on Fisheries and Wildlife Conservation and the Environment, 93d Cong., 2d Sess., ser. no. 93-24, at 22 (1974).

In light of this history, it is evident that the court has today created another hoop, nowhere to be found in the statute, through which NOAA must jump before it can issue a permit for the taking of marine mammals.[5] But this hoop is singular in its difficulty. The court's construction of the MMPA effectively requires that *no* permit for *any* species issue until a permit for *all* mammals likely to be entangled can lawfully issue. This far-reaching construction fails, I believe, to account for NOAA's obligation under the Act to fashion a workable permit system on a species-by-species basis.

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[5] Although the MMPA provides for a full panoply of remedies, including vessel seizure and criminal sanctions, §§ 1374-1375, the statute does not provide for the remarkable remedy that the District Court has chosen to craft here and that the court today affirms—that is, an injunction against issuing a permit for the taking of one species when another, for which no permit may lawfully issue, will inevitably be taken.

B

Two other factors support the view that Congress intended to achieve protection of marine mammals other than by a blanket prohibition inexorably halting all fishing operations. First, the MMPA clearly envisioned a gradual reduction in takings through new techniques and enforcement mechanisms, *see e.g.*, § 1380 (research grants), § 1381 (fishing gear development), § 1378 (international program), while permitting underlying fishing activity to continue. Second, the Federation is allowed to fish in waters subject to U.S. jurisdiction (the U.S. EEZ) pursuant to U.S. treaty obligations embodied in the International Convention for the High Seas Fisheries of the North Pacific Ocean ("INPFC"), May 9, 1952, 4 U.S.T. 380, T.I.A.S. No. 2786. The treaty, as amended in 1978, 30 U.S.T. 1095, T.I.A.S. No. 9242, provides for an area of approximately 775,000 square miles outside the U.S. EEZ in which North American-origin salmon and marine mammals are protected. The treaty allows, in return, Japanese salmon fishing operations within an area of approximately 80,000 square miles inside the U.S. EEZ where the Japanese catch is primarily salmon of Asian origin. *See* Brief for the Federal Appellants at 4. Although the Federation's fishing activity within the U.S. EEZ is subject to regulation under the MMPA, Congress clearly envisioned the continuation of that fishing activity within the regulatory framework established by the statute.

In sum, the MMPA did not prohibit salmon gillnet fishing; rather, it *allowed* fishing to continue while at the same time placing a prohibition on marine mammal takings except to the extent that permits could be issued in accordance with statutory criteria for *each* species. Congress in fact contemplated precisely the anomalous situation that the court finds troubling. Maj. op. at 13-14. At the very

least, Congress enacted a statutory scheme that places in tension the goal of total elimination of marine mammal takings and the need for a workable permit system administered in accordance with statutory criteria. *Chevron* and its progeny teach that we should defer to the reasonable resolution of that tension by the agency charged by Congress with the task of resolving it.

II

In my view, NOAA's interpretation and administration of the MMPA is eminently reasonable. The Center for Environmental Education ("CEE") reasons, however, that NOAA's interpretation of the MMPA "create[s] an entire class of unreviewable takings fully outside the regulatory structure of the MMPA" because "the Secretary's approach allows takings *whether or not* the statutory requirements are met." CEE Brief at 33. The argument is essentially that once incidental takings are "allowed," if not "permitted," then one is entirely outside the statutory scheme and its rigorous criteria aimed at guiding permit issuance.

But NOAA has administered the Act in no such manner. Although rejecting the ALJ's recommendation to issue a permit for the taking of fur seals, NOAA explicitly credited the ALJ's finding that the number of seals that would nevertheless be unavoidably taken would not adversely affect that species' population. Decision of the Under Secretary at 2, 10, Appellant App. at 128, 136. As we indicated above, note 4 *supra,* NOAA took cognizance of the fact that the population of Commander Islands fur seals is subject to a managed commercial harvest of 4,000 to 5,500 animals per year. NOAA's determination is also supported by its estimate that native Alaskans would take several thousand Pribilof Islands fur seals for subsistence

in 1987. 52 Fed. Reg. 26479 (July 15, 1987) (final notice); 52 Fed. Reg. 17307 (May 7, 1987) (notice and request for comment). NOAA concluded, reasonably, that the subsistence harvests of 1985 and 1986 had no effect on the growth of the population to higher levels. 52 Fed. Reg. at 26482. It was therefore reasonable for NOAA to conclude that the possible taking of only 45 fur seals per year—with a mortality rate of perhaps 10 of those—by the Federation was entirely consistent with the overall policies and purposes of the MMPA.

III

We have seen thus far that Congress did not speak to the precise issue that the court decides today; that the MMPA's text, structure, and legislative history support the agency's interpretation; and that NOAA's administration of the statute represents a reasonable resolution of conflicting policies embodied in the statute. It is evident, then, under *Chevron's* two-step analysis that judicial deference to the agency's reasonable interpretation is required. But in the present setting, several additional considerations point powerfully in favor of deferring to the agency's interpretation.

First, NOAA is charged with administering a statute which sets forth a *variety* of objectives (including a workable permit system, as described above). Under the MMPA, NOAA is obliged to take into account the following factors in adminstering the permit system:

> (1) existing and future levels of marine mammal species and population stocks;
>
> (2) existing international treaty and agreement obligations of the United States;
>
> (3) the marine ecosystem and related environmental considerations;

(4) the conservation, development, and utilization of fishery resources; and

(5) the economic and technological feasibility of implementation.

§ 1373(b). Today, the court features only the first factor in its analysis. The agency, in contrast, is not at leisure to stop at factor number one, for it has a statutory duty to consider all five. The agency, in short, cannot call it a day upon completing only one-fifth of the Congressionally ordained exercise.

Second, the agency is undeniably *maximizing* the overall goal of the Act to reduce or eliminate marine mammal takings by the reasonable exercise of its regulatory power. In contrast, the result of today's decision raises the danger that the Japanese will terminate their treaty obligations under the INPFC. The overall result may very well be, ironically, reduced protection for marine mammals, if the Japanese fleet withdraws from fishing activity subject to NOAA regulation. That unhappy state of affairs would be but another testament to the recurring reality of unintended consequences. But there is another, closely related element as well. Because the statute specifically directs the agency to take cognizance of U.S. treaty obligations, it is particularly appropriate that the Executive be afforded reasonable latitude in administering a statute that touches on the arena of foreign policy.

Third, the issue before us is not a question of the agency's power (in the sense of its jurisdictional reach) in which deference to the agency might be less justified. *See ACLU v. FCC,* 823 F.2d 1554, 1567 n.32 (D.C. Cir. 1987); *American Mining Congress v. EPA,* 824 F.2d 1177, 1186-87 (D.C. Cir. 1987). There is thus no reason to assume that NOAA is being less than dispassionate in trying to balance the competing considerations before it. *Cf.*

Schwabacher v. United States, 334 U.S. 182, 204 (1948) (Frankfurter, J., dissenting) ("Since the [ICC] disclaims rather than asserts a power, there is all the more reason to feel assured of its disinterestedness and to resolve ambiguity in favor of its choice of construction.") Rather, the statute requires the agency to apply the law to the facts at hand and to make judgments based upon a number of statutory criteria. What is more, the statutory scheme relies heavily upon the agency's technical expertise.

Finally, Congress has created an additional loop in the decisionmaking process in order better to assure the wisdom of NOAA's permit decisions. The MMPA requires NOAA to consult with the Marine Mammal Commission ("MMC") before prescribing regulations governing takings. § 1373(a). The MMC is a separate advisory body whose members are appointed by the President (with the advice and consent of the Senate) from a list of qualified individuals who must be unanimously agreed upon by heads of other specified Executive Branch agencies. § 1401. The statute thus provides a mechanism to ensure that individuals will provide their independent judgment and give environmental concerns their priority. The MMC has concurred fully with NOAA's interpretation of the Act. Reply Brief of the Marine Mammal Commission Before the United States Department of Commerce. National Oceanic and Atmospheric Administration, and National Marine Fisheries Service 30-31. Appellant App. at 311-12 (recommending that NOAA issue a permit for the taking of Dall's porpoise but deny permits for the fur seals and sea lions that would inevitably be taken). Moreover, in this particular case, NOAA consulted fully with the MMC and accepted the MMC's recommendation not to issue a permit for the taking of fur seals over the contrary recommendation of the ALJ. Decision of the Under Secretary 10, 14, Appellant App. at 136, 140. The advisory

body's ratification of the agency's approach is thus but another factor suggesting the wisdom—quite apart from the legal requirement—of *Chevron* deference.

IV

The court discerns support for its holding in two subsequent amendments to the MMPA. With all respect, the court misses the mark in assuming that Congress' action in these areas has a significant bearing on its intentions in the very different context of salmon gillnet fishing operations.

A

The court reasons that the Federation's problems would be solved if the *de minimis* exception embodied in section 1371(a)(4)(A) had been enacted as originally proposed—that is, without the limitation to "citizens of the United States." Maj. op. at 14. The court infers from Congressional silence that Congress' intent as to this very different issue is so clear as to foreclose the agency's interpretation. In so reasoning, the court misapprehends, I believe, the purposes animating Congress in enacting the amendment.

Congress enacted this section because the procedures leading to an incidental take permit under section 1374 were so burdensome that many fishing operators would not apply for a permit authorizing their few incidental takes. H.R. Rep. 97-228, 97th Cong., 1st Sess. 14 (1981). The exemption is thus activity-based. "Unless a particular activity takes only small numbers of marine mammals, and that taking has a negligible impact on the species, the new provisions of sections 101(a)(4) and (5) [16 U.S.C. § 1371(a)(4) and (5)] are not applicable to that activity." *Id.* at 19. This section was not intended to apply to the situation faced by groups such as the Federation, which seeks general permits to take thousands of marine mam-

mals yearly. *See, e.g.*, 49 Fed. Reg. 1925 (1984) (General Permits issued to the North Pacific Fishing Vessel Owners' Association (3,605 mammals), Pacific Coast Federation of Fishermen's Association (2,790 mammals), and Japan (6,189 mammals)). As to the issue before us, the *de minimis* exception is, with all respect, a fish out of water.

B

The court reasons that Congress made special provision for purse-seine tuna fishing, loosening MMPA requirements by amending § 1371(a)(2) in 1981. Maj. op. at 14-15. The court, I believe, misapprehends the import of the 1981 amendment.

The language cited by the court does nothing to take purse-seine tuna fishing out of the rigorous permit requirements of the MMPA. Rather, the statute commands that fishing operators must make "best efforts" to reduce *killing* or *injuring* marine mammals, even if a permit for their *taking* has issued. Far from representing a "statutory relaxation," *id.*, the amendment mandates an additional goal to which the MMPA—heretofore concerned with regulating only "takings"—had not concerned itself. The change made eminent sense in the purse-seine fishing industry because the techniques used there meant that marine mammals, even though "taken" within the statutory meaning of the term, might easily be set free by use of appropriate techniques. The amendment, in effect, mandates that those techniques be used.[6]

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[6] In purse-seine fishing, two boats set a net around a school of fish. After the net encircles the school, the bottom of the net is tied together, entrapping the fish within. At that point, marine mammals caught within the net are "taken" within the meaning of the MMPA, but in many cases can still be let free without injury.

V

As I have attempted to demonstrate, powerful indications abound pointing in favor of the agency's interpretation in this case. Above all, had Congress wanted to stop all fishing operations in the Bering Sea in order to protect marine mammals from incidental takings, it could readily have done so. Instead, Congress enacted a statute creating a species-based permit system as an integral part of its provisions. Because today's decision robs those provisions of meaningful content and substitutes for a reasonable agency interpretation a rigid judicial construction of the statute, I am constrained respectfully to dissent.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 87-1351

FEDERATION OF JAPAN SALMON FISHERIES COOPERATIVE ASSOCIATION, PETITIONERS

v.

MALCOM BALDRIGE, ET AL., RESPONDENTS

Civil Action No. 87-1440

KOKECHIK FISHERMEN'S ASSOCIATION, ET AL., PETITIONERS

v.

MALCOM BALDRIGE, ET AL., RESPONDENTS

Civil Action No. 87-1472

CENTER FOR ENVIRONMENTAL EDUCATION, ET AL., PETITIONERS

v.

MALCOM BALDRIGE, ET AL., RESPONDENTS

[Filed June 15, 1987]

MEMORANDUM OPINION

These consolidated cases involve the validity of a May 14,,1987, final decision of respondent Secretary of Commerce ("Secretary"). That decision approved the application of the Federation of Japan Salmon Fisheries Cooperative Association ("the Federation" or "the Japanese Federation") for an incidental take permit under section 1374 of the Marine Mammal Protection Act, 16 U.S.C. § 1361-1407 (1972) ("MMPA"), and adopted regulations pursuant to section 1373 of the MMPA which authorize Federation members to take a total of 6,039 Dall's porpoise within the United States' 200 mile fishery conservation zone during the next three years. 50 C.F.R. 216.24(d)(5)(vii).

Presently before the Court are the motions of petitioners in each of the three cases for a preliminary injunction. Upon consideration of the supporting and opposing memoranda, oral argument of counsel, and the record submitted to the court to date, the motions of the petitioners in Kokechik Fishermen's Association, *et al.* and Center for Environmetal Education, *et al.*, shall be granted. The motion of the Japanese Federation shall be denied as moot.

Historical Background

Kokechik alleges that Japanese fishing vessels began fishing for salmon with gillnets in Alaskan waters as early as 1904. By 1937, prompted by complaints from fishermen in the United States that Japanese gillnets were destroying Alaskan salmon stocks, the United States Senate passed a resolution that demanded that Japanese vessels stop salmon fishing off the coast of western Alaska. *See* 81 Cong. Rec. 2670, March 24, 1937. Although the Japanese gillnet salmon fishery in the Bering Sea and North Pacific

Ocean was suspended during the Second World War, at the urging of Senator Warren Magnuson, President Truman in 1945 executed a presidential proclamation authorizing the U.S. Government to establish conservation zones in the areas of the high seas contiguous to the coasts of the U.S. where fishing activities had been or in the future might be developed and maintained on a substantial scale. 59 Stat. 885 (Sept. 28, 1945). An explicit purpose of the proclamation was to "protect coastal fishery resources from destructive exploitation . . . ." *Id.* The Truman proclamation was never implemented, however.

Between 1937 and 1952 Kokechik alleges that Japanese vessels fished extensively for salmon, including salmon of United States origin, in the Bering Sea and North Pacific Ocean and entrapped and drowned significant numbers of various marine mammals in their gillnets. *See* Kokechik Petition for Review at 8-9. The Federation denies that significant numbers of marine mammals or other animals were taken by the Japanese gillnet fishery prior to 1952 and denies that significant numbers of marine mammals or other animals were taken by the Japanese gillnet fishery between 1952 and 1976. *See* Answer of Federation at 3.

The International Convention for the High Seas Fisheries of the North Pacific Ocean, 4 U.S.T. 380, T.I.A.S. No. 2786 ("INPFC"), was signed by Canada, Japan, and the United States in 1952 and entered into force in 1953. The chief motivation behind the INPFC was the desire of the U.S. and Canada to minimize the interception of North American origin salmon by Japan's salmon fishery in the North Pacific and Bering Sea. This was accomplished by the initiation of the "absention principle" under which Japan agreed to astain from fishing for salmon east of longitude 175° West in the North Pacific Ocean and Bering Sea.

The Magnuson Fishery Conservation and Managment Act of 1976 ("Magnuson Act") established a 200 mile fishery conservation zone ("FCZ" or now known as the Exclusive Economic Zone "EEZ") surrounding the coast of the U.S. Pursuant to the Magnuson Act, no foreign vessel, including vessels operated by Federation members, may fish within the zone for fish stocks that are fully utilized by U.S. fishermen. This Act directed the Secretary of State, in cooperation with the Secretary of Commerce, to initiate the renegotiation of any treaty pertaining to fishing within the FCZ and for certain other fishery resources beyond the FCZ, which were inconsistent with its provisions. As the 1952 INPFC was inconsistent in several respects with the Magnuson Act, it was determined necessary to renegotiate or terminate the INPFC.

On February 10, 1977, the U.S. gave notice of its intention to terminate the INPFC in one year unless it was renegotiated in that period. An agreement on a Protocol to the INPFC was signed by Canada, Japan, and the U.S. on April 25, 1978. This Protocol moved the abstention line to 175° East longitude, with the exception of a portion of the north central Bering Sea outside the U.S. FCZ. Additional areas where North American salmon and marine mammals are protected from fishing by Japan under the INPFC include approximately 775,000 square miles outside the U.S. FCZ. The Japanese mothership fleet, in return, is allowed to fish for salmon of primarily Asian origin in 70,000 square miles inside the U.S. FCZ between June 10 and July 31 of each year.

As part of the newly negotiated INPFC, all parties agreed to establish a program of coordinated scientific research as well as to establish procedures to facilitate observation of the mammal stock and fishing operations. Japan and the U.S. further agreed to a research program designed to reduce or eliminate the incidental take of

marine mammals and assess the distribution, abundance, and status of Dall's porpoise taken incidentally in the high seas salmon fishery. The study included the biology, ecology, reproduction, food habits, and age structure of the mammals.

At the time the INPFC was renegotiated, the U.S. was aware that if Federation members were allowed to set their gillnets within the U.S. conservation zone, Dall's porpoise, fur seals, harbor propoise, northern right whale dolphin, Pacific white-sided dolphin, common dolphin, sea lions, and other marine mammals would be entangled or drown in the nets set by the Japanese. For that reason, in 1978, the same year the Senate ratified the Protocol than amended the INPFC, the Congress amended the North Pacific Fisheries Act.

The North Pacific Fisheries Act of 1954, 16 U.S.C. § 1021 *et seq.* ("NPFA"), implemented the INPFC in the U.S. It was amended in 1978 to reflect the new Protocol and its Annex concerning the marine mammal research. At that time, in accordance with the North Pacific Fisheries Act and the INPFC, the Japanese fishery was exempted from the incidental take permit requirements of the MMPA for a period of three years, during which time the U.S. and Japan agreed to study the effect of the salmon fishery on marine mammal populations and to work to reduce or eliminate incidental takings. Section 14 of the NPFA stated: "After June 9, 1981, the taking of marine mammals incidental to fishing operations by Japanese vessels within the fishery conservation zone shall be regulated pursuant to the Marine Mammal Protection Act of 1972 . . . ." As the statutory waiver granted in the North Pacific Fisheries Act under which the Japanese operated was to expire in 1981, the Federation submitted an application for an incidental take permit under the Marine Mammal Protection Act on January 19, 1981.

This application requested a general permit for three years (1981 to 1983).

The Marine Mammal Protection Act

Although the U.S. has allowed the Federation to enter the U.S. FCZ and set gillnets for salmon, its ability to do so is not unconditional. The Federation and the Japanese government acknowledge that Federation members may not fish in the U.S. FCZ unless, while in the zone, they comply with the laws of the U.S. The MMPA is one of the laws Federation members must observe while fishing for salmon within the U.S. fishery conservation zone. It is that law which is at issue in this case.

Congress expressly found and stated in the MMPA that "certain species and population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of man's activities . . . . [S]uch species and population stocks should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part, and consistent with this major objective, they should not be permitted to diminish below their optimum sustainable population . . . ." MMPA § 1361.*

Section 1371 of the MMPA imposes a moratorium on the "take" of all marine mammals in water subject to the jurisdiction of the U.S., including the Bering Sea and

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* Pub. L. 95-426, Title VI § 602, Oct. 7, 1978, 92 Stat. 985 provided that: "It is the sense of the Congress that the President should convey to all countries having an interest in cetacean sea life the serious concern of the Congress regarding the continuing destruction of these marine mammals (highlighted by the recent slaughter of dolphins in the Sea of Japan by Japanese fishermen) and should encourage countries . . ." to engage in discussions, exchange information, cooperate in establishing an international cetacean commission and adopt comprehensive marine mammal protection legislation.

North Pacific Ocean. The term "take" is defined by the MMPA to mean "harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." MMPA § 1362(12). A moratorium is defined as "a complete cessation of the taking of marine mammals. . . ." MMPA § 1363(7). Defendant Secretary of Commerce has interpreted the term "harass" to include "the restraint or detention of a marine mammal, no matter how temporary." 50 C.F.R. § 216.3. Consequently, when a marine mammal entangles itself in a gillnet, even if the mammal manages to struggle free before it drowns, the Federation catcherboat captain who authorized the net to be set has committed a "taking" as the term is defined in the MMPA.

In recognition of the fact that marine mammals may frequently be taken in gillnets set to take fish, section 1371(a)(1) of the MMPA authorizes the Secretary to waive the moratorium and allow marine mammals to be taken incidentally in the course of commercial fishing operations. Several statutory criteria must be met and findings made in order to assure the primary protection of marine mammal populations, which is guaranteed by the MMPA, before an incidental take permit may be issued. MMPA §§ 1371-75.

Regulations implementing the MMPA and establishing procedures by which the general moratorium on the taking of marine mammals in connection with commercial fishing operations may be waived, have been promulgated by the Secretary in 50 C.F.R. Part 216. These regulations establish the requirements which must be met before regulations waiving the moratorium may be promulgated and a marine mammal take permit may be issued, and they also establish the procedures which must be followed in the formal administrative hearing which must be held on any application for a marine mammal take permit. 50 C.F.R. Part 216, Subparts C and G. Permits may be

granted if it is shown, on the basis of "the best scientific evidence available", that the taking will not be to the disadvantage of the stocks involved and will be consistent with the purposes and policies of the MMPA. MMPA § 1373(a). Section 1371 states: "In any event it shall be the immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate." MMPA § 1371(a)(2).

In 1981, after formal hearings before an Administrative Law Judge, the National Marine Fisheries Service (the delegate of the Secretary of Commerce with authority to grant permits under the MMPA) agreed with the ALJ's recommended decision to grant a three-year permit with annual quotas for 5,500 Dall's porpoise, 450 Northern fur seals, and 25 Northern sea lions. 46 Fed. Reg. 27056 (May 15, 1981).

An environmental group challenged the issuance of this permit in *Friends of Animals v. Baldridge,* No. 81-1547 (D.D.C. 1982). No temporary restraining order or preliminary relief was sought in that case; consequently, one year of fishing under the permit took place and a second was imminent, prior to the court's consideration of the merits. *Id.,* slip op. at 4. At issue was the meaning of the "best scientific evidence available" standard.

The court held that if the weight of authority suggests a certain figure is most likely, that figure should be adopted. *Id.* at 8. The court stated that "[a]lthough the Court does not necessarily approve of decisions, based as this one was, on a lack of data, the Court cannot say that the choice was unreasonable, especially when the choice was supported by the overwhelming weight of scientific opinion." *Id.* at 10-11. It was pointed out that the "pervasive lack of empirical data underlying the variables . . . used in

determining that the permit to take porpoise would not be to the disadvantage of the species is extremely troubling." *Id.* at 13.

In 1982, Congress, for a second time, amended the North Pacific Fisheries Act to extend the Federation's permit through June 9, 1987. NPFA § 1034(b). These amendments also require the Federation to assist as requested in meeting the objectives of the research program agreed to by the U.S. and Japan and to provide appropriate funding to carry out a joint research program on Dall's porpoises. In April 1986 the parties to the INPFC, after extensive negotiations, adopted new measures intended to reduce further the incidental take of U.S. origin salmon by Japanese high seas mothership and landbased fisheries. The measures provide for a phasing out of the Japanese mothership fleet from various specified portions of the Bering Sea over the next nine years. Changes are also made in the landbased fishery as well as in an intensification of research relating to the contingent origin of salmon.

The Federation's MMPA permit, as extended by the North Pacific Fisheries Act, expired on June 9, 1987. The Federation, on July 21, 1986, applied for a new permit authorizing its members to take 5,500 Dall's porpoise, 450 fur seals, and 25 sea lions during each of the next five years. 51 Fed. Reg. 9674 (August 16, 1986). No request was made to take harbor porpoise, common dolphin, and other marine mammals likely to be taken if Federation members are allowed to set their gillnets within the U.S. fishery conservation zone.

The Method of Gillnet Fishing

If the challenged permit is upheld, on June 10, 1987, 129 catcherboats operated by Federation members will enter

the waters of the U.S. fishery conservation zone in the area of the Bering Sea and North Pacific Ocean surrounding the western end of the Aleutian Islands off the coast of Alaska. Each night at dusk each catcherboat will set a nylon monofilament gillnet 9.3 miles long and 26 feet deep. A total of 1,200 miles of net length will be set. This fishery will set out and retrieve 129 of these over nine mile long gillnets every night of the approximately two month fishing season. In addition to catching immature salmon, the nets entangle Dall's porpoises and other marine mammals, including depleted populations of northern fur seals as well as sea birds, sea lions, harbor porpoise, northern right whale dolphin, and common dolphin, causing death or serious injury to many of the individual marine mammals. *See generally* National Marine Fisheries Service, U.S. Dept. of Commerce, Final Environmental Impact Statement and Economic Impact Analysis on the Incidental Take of Dall's Porpoise in the Japanese Salmon Fishery (May 1987) ("Final EIS").

Between June 10 and July 31, 1987, Federation members are authorized to set 9.3 miles of net as many as 6,020 times. Each time they do so, it is inevitable that some protected marine mammals will be entangled in the nets. Other than not setting their nets at all, there is nothing the captains and crews of Federation catcherboats can do to avoid entangling and drowning marine mammals and sea birds while fishing for salmon. *See* testimony of the Federation's expert witness, Horoshi Ogiwara, an experienced fleet commander. *Kokechik* Brief at 11.

Identity of the Parties

In the *Federation of Japan Salmon Fisheries v. Baldridge* case filed in this court on May 20, 1987, Civ. No. 87-1351, plaintiff sought review against respondents

Secretary of Commerce and Undersecretary for Oceans and Atmosphere and to declare illegal, enjoin, and set aside certain actions of the respondents purportedly taken under the MMPA. On May 22, 1987, the Federation moved for expedited consideration of their petition, and on June 1, moved for a preliminary injunction. Petitioner is the Japanese Federation, a nonprofit cooperative association representing the Japanese high seas mothership salmon fishery. Respondents are the Secretary of Commerce, Malcolm Baldridge, the federal official charged with responsibility for granting, modifying, suspending, or revoking permits for fishing vessels under the MMPA, and Anthony Calio, the Undersecretary of Commerce for Oceans and Atmosphere, who is delegated authority by the Secretary to carry out the functions described by the MMPA.

In civil action number 87-1440, the Kokechik petitioners filed a complaint and motion for preliminary injunction on May 27, 1987, as a case related to the Federation case already filed with this Court. The Kokechik petitioners also sought review of the action taken by the Secretary of Commerce, in which a permit was issued and regulations adopted authorizing Federation members to take Dall's porpoise while fishing for salmon in the 200 mile U.S. fishery conservation zone, the same action challenged by the Federation in their case. Kokechik sought a declaratory judgment and preliminary and permanent injunction.

A third related case, *Center for Environmental Education v. Baldridge,* Civ. No. 87-1472, was filed with this Court one day after the Kokechik case, on May 28, 1987. Malcolm Baldridge, the Secretary of Commerce, Anthony Calio, the Undersecretary for Oceans and Atmosphere, William E. Evans, the Assistant Administrator for Fisheries, National Marine Fisheries Service, the U.S. Department of Commerce, the National Oceanic and At-

mospheric Administration, and the National Marine Fisheries Service were named as defendants. All of the plaintiff organizations participated extensively in the administrative proceeding before the U.S. Department of Commerce relating to the Japan Federation's application for a marine mammal take permit for its gillnet salmon fishery, and all of them opposed the issuance of the permit by the Secretary. All allege that the issuance of the permit adversely affects their organizational interests, as well as the use and enjoyment by their members of the marine environment and the marine mammal and sea bird species affected by the issuance of the permit.

The Administrative Proceedings

Pursuant to the regulations implementing the MMPA, an ALJ conducted a formal hearing on the Federation's application in Seattle, Washington, in December 1986. The Kokechik Fishermen's Association, the Qaluyaat Fishermen's Association, all the petitioners in the CEE case, and the Japanese Federation participated as parties in the hearing. Subsequent to the formal administrative hearing, respondent NOAA on December 30, 1986, issued a proposed notice, pursuant to 50 C.F.R. Part 216, for the designation of the North Pacific fur seal—Pribilof Island Population, as "depleted" under the MMPA. MMPA § 1362(1). 51 Fed. Reg. 47156. A depleted population of marine mammals is one which has been determined to be below its optimum sustainable population. MMPA § 1362.

After consideration of over 3,500 pages of testimony, exhibits, and the receipt of extensive legal briefs, ALJ Hugh J. Dolan recommended on March 6, 1987, that a five (5) year permit be issued to the Japanese Federation that would allow 1,750 Dall's porpoise and 45 northern fur

seals from the Commander Islands stock to be killed or seriously injured during 1987. For each of the four subsequent years, the ALJ recommend that the quota for Dall's porpoise be reduced by five per cent from the previous year. The ALJ also made findings and recommendations concerning permit terms and conditions and further research needs. Exceptions were filed to the recommended decision of the ALJ.

On May 28, 1987, James E. Douglas, Jr., the Acting Deputy Assistant Administrator for Fisheries, National Marine Fisheries Service, published the final decision of the Department of Commerce, as signed by Undersecretary Calio on May 14, 1987, in the Federal Register. 52 Fed. Reg. 19874 (May 28, 1987). That action amended 50 C.F.R. Part 216 to allow the Japanese Federation to take 6,039 Dall's porpoise in the next three years of which no more than 448 may be taken from the Bering Sea and no more than 2,494 may be taken from the North Pacific Ocean in any single calendar year. The ALJ's recommendation that the permit include fur seals was not adopted. Additionally, incidental take levels authorized by the subpart were reduced proportionately in the event that the Soviet Union reduced salmon quotas for 1988 or 1989 by more than 10 percent of the 1987 quota.

The Challenges to the Secretary's Action

The Japanese Federation:

The Federation claims that the quotas were based on an assumption that the fishing effort of the Federation in the FCZ will be reduced because of a reduction of the number of Federation vessels. It is asserted that based on the administrative record the decision to reduce the Dall's porpoise quotas to the levels of the permit is erroneous. The Federation also claims that despite the fact that the ALJ

indicated that the Commander stock of Northern fur seals is above the lower boundary of OSP and thus could be taken, the Undersecretary ruled that there was not enough evidence to make such an OSP finding and that the denial of a permit for the taking of Commander stock fur seals is erroneous.

The Undersecretary also imposed a condition on the permit that to the extent the National Marine Fisheries Service is capable of placing U.S. marine mammal observers on vessels in the Japanese landbased salmon and high seas gillnet fleets, they must be readily accommodated. This decision is challenged as erroneous. These errors are alleged to be a violation of the Administrative Procedure Act, 5 U.S.C. § 706(2), and it is alleged that they will cause irreparable injury to the Federation and its members.

The Kokechik Petitioners:

These petitioners make several claims. In sum, they assert that the Secretary knows, and it has been established in respondent's Final EIS, that fur seals will be entrapped in at least nine percent of the gillnet sets utilized by the Japanese Federation, some of which will be from the depleted Pribilof Island stock that respondent concedes is depleted. Despite the knowledge that approximately 541 fur seals and an undetermined number of harbor porpoise, northern right whale dolphin, Pacific white-sided dolphin, common dolphin, and sea lions will in fact inevitably be taken by the Federation in violation of the MMPA, petitioners allege that respondents have unlawfully refused to enforce the non-discretionary provisions of the MMPA. *See* MMPA § 1377.

Rather than informing the Federation that its members will not be allowed to set gillnets, and, in so doing violate

the MMPA within the U.S. FCZ, the Secretary's decision expresses regret that catcherboat captains observed violating the MMPA may have to pay a fine: "Under these circumstances, where a negligible number of non-permitted takings will occur, and where the stock does not require the absolute protection provided by the MMPA, it is unfortunate that those who must pay the penalties will be determined largely by chance." 52 Fed. Reg. 19878 (May 28, 1987). The Secretary's decision then goes on to state that he "intends to seek amendment of the MMPA to permit incidental, but not intentional takings of small numbers of marine mammals, by vessels engaged in commercial fishing if such takings will have a negligible impact on the species and stock." *Id.* This proposed policy of the Secretary has been referred to by respondents as an "accidental take" policy.*

Petitioners claim that the Secretary has a mandatory duty under section 1377 of the MMPA which states "the Secretary shall enforce the provisions of this subchapter." MMPA § 1377(a). Petitioners' argument is that the Secretary's issuance of a permit for Dall's porpoise but not for other marine mammals he foreseeably knows will inevitably be taken along with the Dall's porpoise is a violation of that statutory mandate.

Petitioners also assert several other procedural claims with respect to the administrative process in this case. First, it is claimed that the Environmental Impact Statement failed to include all reasonable alternatives as is required by 42 U.S.C. 4332(2)(C), in that the alternative of pursuing Congressional amendment of the MMPA, which the

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* When questioned at oral argument about the propriety of such a policy in light of the clear import of the MMPA, counsel, in an apparent last minute change of position, asserted that "we are not trying to come under the rubric of the accidental take policy."

Secretary did twice in the past and has indicated in his decision he intends to do in this very case in the future, was not included in the EIS in violation of 42 U.S.C. 4332(2)(E).

Second, petitioners allege that the Secretary has a duty to make a decision pursuant to the procedures set forth in 40 C.F.R. 1506.10 which prohibits the Secretary from making a final decision until 30 days after the publication of a notice in the Federal Register announcing that the EIS has been filed, unless a finding is made that it is in the best interest of the United States Government to waive the 30 day waiting period. Here, a decision was made without awaiting the required 30 days or obtaining the statutory waiver.

Lastly, it is alleged that pursuant to Section 1374(d)(3) of the MMPA, the Secretary may not issue a permit or adopt regulations authorizing takings of marine mammals unless the Secretary first determines that the best scientific evidence available was presented at the hearing held before the ALJ on the permit application. Petitioners assert that in this case the evidence was not the best scientific evidence available and that as a result the decision to issue the permit was arbitrary and capricious and an abuse of discretion by the ALJ.

The CEE Petitioners:

The CEE petitioners allege that the Secretary failed to comply with the provisions of the MMPA in the decision-making process in this case in various respects: by the issuing of a marine mammal permit to the Japanese Federation that will allow the taking of Pribilof Island fur seals, a depleted species protected under the MMPA; by committing several major violations of the strict procedural requirements of the MMPA and the APA, which govern the

conduct of this action; by failing to conduct the required formal administrative proceeding entirely on the record and without any *ex parte* communications, as the MMPA requires; and by failing to comply with the requirement of NEPA.

Analysis

Under this jurisdiction's long standing test in deciding whether to grant an injunction "the District Court should consider (1) the plaintiff's likelihood of prevailing on the merits, (2) the threat of irreparable injury to the plaintiff in the absence of injunctive relief, (3) the possibility of substantial harm to other interested parties from the injunctive relief, and (4) the interests of the public." *Foundation on Economic Trends v. Heckler,* 756 F.2d 143, 151 (D.C. Cir. 1985) (citing *WMATC v. Holiday Tours,* 559 F.2d 841, 842-43 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. FPC,* 259 F.2d 921, 925 (D.C. Cir. 1958)). It is this test which must now be applied to the facts.

(1). Petitioners' likelihood of prevailing on the merits:

The petitioners assert different interests and have made different claims; thus, their likelihood of prevailing must be examined individually. Looking first at the Kokechik petitioners, the Court finds their claims to be meritorious and that they have a substantial likelihood of success on the merits. It is, therefore, not necessary to reach the other claims asserted by the several different petitioners at this preliminary stage.

The full administrative record has not yet been filed with the Court; however, certain documents contained therein, such as the recommended decision of the ALJ, the Final Environmental Impact Statement, the notices

published in the Federal Register, the final decision of the Secretary, and the affidavits of several parties (some of whom testified at the administrative hearing) are presently before the Court. This record is adequate to determine the proper interpretation of the MMPA and whether the MMPA has been properly interpreted by the Secretary.*

Returning to Kokechik's primary claim, our inquiry must focus on whether the Secretary's interpretation, as expressed in the regulation that grants the permit at issue to the Japanese Federation, is reasonable and consistent with the statutory language, legislative history, and purpose of the MMPA. "Our inquiry is informed by an awareness that the regulation is entitled to deference unless it can be said not to be a reasoned and supportable interpretation of the Act." *Whirlpool Corp. v. Marshall,* 445 U.S. 1, 11 (1980). "In reviewing an agency's interpretation of a statute, a court should first examine the language of that statute to determine whether the interpretation falls within the statute's plain meaning." *General Motors Corp. v. Ruckleshaus,* 724 F.2d 979, 989 (D.C. Cir. 1983). If the meaning of the statute is clear, "that is the end of the matter, for the Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.,* 106 S.Ct. 681, 686 (1986) (citation omitted).

* The claims which require the Court to review the administrative record to determine if it contained substantial evidence to uphold the Secretary's decision are Kokechik's claim relating to the use of the best scientific evidence at the administrative hearing, and the Federation's claim that the record does not contain substantial evidence to support the final decision made. Even with respect to those claims, which are founded in the APA and thus governed by the APA standard of review, the Court is able to resolve the issue of whether success on the merits is likely based on the present record and the argument of counsel.

The MMPA has been examined and interpreted by both the District Court and the Court of Appeals for the District of Columbia Circuit in *Committee for Humane Legislation, Inc. v. Richardson,* 414 F. Supp. 297 (1976), aff'd. 540 F.2d 1411 (1976). This Court is bound by and adopts that interpretation and its reasoning which will not be repeated at length here. It was, however, observed in *Richardson* that "[t]he primary purpose of the MMPA is to protect marine mammals; the Act was not intended as a "balancing Act" between the interests of the fishing industry and the animals." *Richardson,* 414 F. Supp. at 306; *accord,* 540 F.2d at 1148. "The interests of the marine mammals come first under the statutory scheme, and the interests of the industry, important as they are, must be served only after protection of the animals is assured." 414 F. Supp. at 309.

Here, the Secretary has interpreted the MMPA so as to allow him to issue a permit to the Federation to take one species of mammal, Dall's porpoise, for which the required finding of no disadvantage based on optimum sustainable population has been made, even though the Secretary knows other species will also be taken and as to those other species no such finding has been made. In his decision the Secretary explains that under the circumstance where "a negligible number of nonpermitted takings will occur," a permit will be issued even though the statutory provisions to issue a permit for those species have not been met and and penalties will be imposed upon those who are caught taking the mammals. 52 Fed. Reg. 19878 (May 28, 1987). The decision does not define "negligible" in numerical terms nor in terms of stock population.

It is noted that "Congress foresaw the possibility that, in a given situation, there would be a lack of scientific information as to whether a proposed level of taking would be to the disadvantage of the marine mammals involved",

Richardson, at 310, and that might result in an inability to find whether the stock was at its optimum sustainable population. " 'Before issuing any permit for the taking of a marine mammal, the Secretary must first have it proven to his satisfaction that *any* taking is consistent with the purposes and policies of the act—that is to say, that taking will not be to the disadvantage of the animals concerned. *If he cannot make that finding, he cannot issue a permit. It is that simple.' " Id.* (citing 118 Cong. Rec. 7686 (1972) (floor remarks)). This conclusion was found by the court to be supported elsewhere in the legislative history. *Id.*

In *Richardson,* the court also stated that Congress required in section 1371(a)(3)(A) and 1373(a) an explicit finding that a taking will not disadvantage the marine mammals involved prior to adopting such regulations because "only by knowing whether the population level would be reduced to a less-than-optimum level as a result of the taking could the agency determine whether such taking would be to the 'disadvantage' of the animals involved." *Id.* at 309-10. The Court of Appeals found that "the District Court had correctly interpreted the law as written." 540 F.2d at 1149.

The *Richardson* court cites a Marine Mammal Commission statement indicating that it could not find that "any number above zero" would satisfy the high burden required to be met to find no disadvantage to a particular stock. *Id.* at 305. In this case, the permit issued appears to be invalid under the MMPA because a finding that all the marine mammals the Secretary knows will inevitably be taken are at or above their optimum sustainable population level has not been made. Importantly, one of the marine mammals involved, the Pribilof Island fur seal stock, has been found by the agency to be depleted*. It is,

* "Depleted" is defined in the MMPA as "any case in which (A) the Secretary . . . determines that a species of population stock is below

by statutory definition, impossible for a Pribilof fur seal to be taken without disadvantaging the stock. Under the plain language of the MMPA and in accordance with the interpretation of the MMPA as stated in *Richardson,* the Secretary is not given discretion to determine that a taking will not disadvantage of stock unless the specifically required statutory finding regarding optimum sustainable population has been made. Congress has clearly made the determination as to when a stock will or will not be considered disadvantaged.

The MMPA imposes an absolute moratorium on all takings of marine mammals. The only way this moratorium may lawfully be ignored is through explicit Congressional action, as has been done for the Federation twice in the past, or by meeting the burden of proof** necessary to allow the agency to find that a single taking will not disadvantage a particular stock because that stock is within the range of its optimum sustainable population. For the Secretary to issue a permit for only the Dall's porpoise, when it is clear that other marine mammals are certain to be taken*** yet no permit was issued for such mammals because a finding could not be or was not made, appears, at this juncture, clearly contrary to the MMPA.

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its optimum sustainable population; (B) a State . . . determines that such species or stock is below its optimum sustainable population; or (C) a species or population stock is listed as an endangered spcies or a threatened species under the Endangered Species Act of 1973 [16 U.S.C. 1531 et seq.]." MMPA § 1362(1).

** The burden of proof with regard to showing that the taking will not disadvantage the species or stock is "by no means a light burden". *Id.* at 303.

* There is evidence based on the Federation's history of fishing in this area that these mammals have been taken in the past; thus, there is no reason to expect that they will not continue to be taken.

The Secretary argues that "even though a small number of marine mammals not authorized by a permit may be taken incidental to the salmon fishing, that fact does not preclude the issuance of a permit for other species." Respondent's Brief at 19. Contrary to that argument, it appears that if it is known by the Secretary that any mammals will be taken and there has been no finding that such mammal stock is within its optimum sustainable population no permit may be issued. Moreover, exactly what number of takings would constitute a "small number" is never identified by the respondents. This "*de minimus*" [*sic*] interpretation appears inconsistent with the plain meaning of the provisions of the MMPA. Congress has enacted a statute which does not recognize a *de minimus* [*sic*] taking and does not delegate to the Secretary authority to exercise discretion with regard to whether a taking is or is not *de minimus* [*sic*] or will or will not disadvantage a stock which is not at its optimum sustainable population. The standard which must be met before a taking is allowed is clearly spelled out in the MMPA and is mandatory.

The Secretary also indicates "his intent to enforce the taking provision through the civil penalty sanctions that Congress authorized in section 105 of the MMPA", and argues that "[t]he Under Secretary may exercise his discretion regarding the specific enforcement action to be instituted against anyone who takes marine mammals without a permit." Respondent's Brief at 19. Section 1377 of the MMPA, the enforcement provision of the statute, clearly states "the Secretary shall enforce the provisions of this subchapter." MMPA § 1377(a). The statutory duty of the Secretary is thus mandatory, not discretionary. To allow the Secretary to enforce the MMPA at his discretion by way of civil penalty in the case of unlawful takings, of which the Secretary had reason to expect, would result in rendering the strict requirements of obtaining a permit

under the MMPA meaningless. It would allow the violator to, in effect, purchase the right to violate a mandatory prohibition and allow the agency to engage in the sort of "fine utilitarian calculations" regarding the value of an endangered species the Court found unacceptable in *TVA v. Hill,* 437 U.S. 153, 187 (1977) and which under the MMPA have been precluded by Congress.

If the Secretary believes that a change of policy is essential to properly enforce the MMPA, the appropriate forum to initiate a change is in Congress, as the Secretary indicated in his final decision he in fact plans to do. He is not free, however, to implement that change by adopting an interpretation of the MMPA which conflicts with the language and intent of the statute.Nor is it for this Court to institute such a change in light of clear statutory purpose and mandate to do otherwise.

The Court need not consider the Federation's motion for preliminary injunction at this time since its decision on the Kokechik claims effectively renders the Federation's claims moot.

(2). The threat of irreparable injury to the plaintiff in the absence of injunctive relief:

The Kokechik petitioners claim that harbor porpoise, northern right whale dolphin, Pacific white-sided dolphin, common dolphin, sea lions, and other marine mammals will be taken in the fishery and that these takings will irreparably harm the stocks of those species. The CEE petitioners also allege irreparable injury to various marine mammal populations, including the depleted Pribilof Island fur seal. As was asserted by the Kokechik petitioners, the CEE petitioners also claim that, once marine mammal populations are harmed, the damage cannot be undone or compensated for. The MMPA requires the

agency to act as a trustee for these mammals and protect their interests. Unless a preliminary injunction is granted and the fishing permit rescinded so that the mandate of the MMPA may be properly carried out, irreparable harm will be done to the enumerated mammal populations.

Instruction is given by the Supreme Court in *Amoco Production Co. v. Gambell,* 107 S.Ct. 1396 (1987) which states "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.,* irreparable.* If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Id.* at 1404.

(3). The possibility of substantial harm to other interested parties from the injunctive relief and (4). The public interest:

Respondents argue that the issuance of a preliminary injunction will harm the United States should Japan choose to dishonor the INPFC and a destabilization of the international conservation regime result. This potential for harm, however, may be alleviated, should it occur, if Congress were to waive the requirements of the MMPA as to the Japanese Federation for this season as it has done for

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* At issue in *Amoco* were the exploration activities of the defendant oil company occurring Alaska which were alleged to violate a Federal statute providing protection for natural resources used for subsistence in Alaska. The district court declined to issue a preliminary injunction and the Supreme Court upheld that decision, after balancing the competing public interests involved, based on the finding that "[t]here, however, injury to subsistence resources . . . was not at all probable." *Id.* It was also found by the district court that the public interest favored the continued oil exploration and such exploration in this case would not cause the type of harm, a restriction in subsistence uses or resources, that that [Federal statute] was designed to prevent." *Id.*

the past six years. Moreover, the likelihood of harm is speculative.

The harm the Japanese Federation alleges will result from the issuance of a preliminary injunction appears to be strictly economic. The Federation will be unable to continue gillnet fishing operations within the FCZ pending further administrative or Congressional action.

When the irreparable harm to the marine mammal populations which will occur, if an injunction is not granted, is balanced against the harms alleged by respondent and the Federation, the interests of the marine mammal populations at stake in this case outweigh those of the other interested parties. This is especially apparent when the public interest in protecting the environment is considered. While this Court recognizes that " 'a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law,' " *Amoco*, at 1402, on these facts, unlike the facts of *Amoco*, after balancing the competing interests involved, the Court concludes that the purpose of the MMPA—to restore, maintain, and protect the integrity of the marine mammal populations—*would* be undermined by allowing the statutory violation to continue.

Unlike *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982),* here it is certain that unlawful takings of marine mammals will occur if the permit issued to the Japanese Federation is allowed to stand. Congress has already determined that such takings are harmful to the environment and this Court has no basis on which invalidate that determination. Furthermore, here, unlike the *Amoco* case, the public interest does not lie in protecting the economic well-

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* In *Romero-Barcelo* the District Court found that defendant's violations of the environmental statute at issue did not cause any "appreciable harm to the environment." *Id.* at 310.

being of the Federation fishermen, but, as clearly required by the MMPA, in carrying out Congress' will in protecting the marine mammals and maintaining the health and stability of the marine ecosystem.

/s/ NORMA HOLLOWAY JOHNSON
NORMA HOLLOWAY JOHNSON
United States District Judge

DATED: June 12, 1987

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 87-1351

FEDERATION OF JAPAN SALMON FISHERIES COOPERATIVE ASSOCIATION, PETITIONERS

v.

MALCOM BALDRIGE, ET AL., RESPONDENTS

Civil Action No. 87-1440

KOKECHIK FISHERMEN'S ASSOCIATION, ET AL., PETITIONERS

v.

MALCOM BALDRIGE, ET AL., RESPONDENTS

Civil Action No. 87-1472

CENTER FOR ENVIRONMENTAL EDUCATION, ET AL., PETITIONERS

v.

MALCOM BALDRIGE, ET AL., RESPONDENTS

[Filed June 15, 1987]

ORDER

Upon consideration of the motions for a preliminary injunction, the legal memoranda and exhibits, the argument of counsel, and consistent with the accompanying Memorandum Opinion, it is this 12th day of June, 1987.

ORDERED that the motion of the Federation be, and hereby is, denied as moot; it is further

ORDERED that the motions of petitioners Kokechik and the Center for Environmental Education be, and hereby are granted; it is further

ORDERED that Respondents be, and hereby are, preliminary enjoined from granting a permit to the Federation of Japan Salmon Fisheries Cooperative Association in the United States Exclusive Economic Zone; and it is further

ORDERED that this preliminary injunction shall not issue until appropriate bond is posted. Counsel are invited to submit recommendations as to the appropriate bond not later than noon on June 19, 1987.

/s/ NORMA HOLLOWAY JOHNSON
NORMA HOLLOWAY JOHNSON
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 87-1351

FEDERATION OF JAPAN SALMON FISHERIES COOPERATIVE ASSOCIATION, PETITIONERS

v.

MALCOM BALDRIGE, ET AL., RESPONDENTS

Civil Action No. 87-1440

KOKECHIK FISHERMEN'S ASSOCIATION, ET AL., PETITIONERS

v.

MALCOM BALDRIGE, ET AL., RESPONDENTS

Civil Action No. 87-1472

CENTER FOR ENVIRONMENTAL EDUCATION, ET AL., PETITIONERS

v.

MALCOM BALDRIGE, ET AL., RESPONDENTS

[Filed June 23, 1987]

ORDER

Federation of Japan Salmon Fisheries Cooperative Association, ("Federation") having moved for an order staying enforcement of the Order issued by this Court on June 12, 1987, pending an appeal therefrom to the United States Court of Appeals for the District of Columbia Circuit, and this Court having fully considered the motion and being of the opinion that the Federation is not entitled to the relief requested; it is this 23rd day of June, 1987,

ORDERED that the motion of the Federation for a stay of the Order of June 12, 1987, granting a preliminary injunction in favor of certain petitioners be, and hereby is, denied, it is, however, further

ORDERED that a temporary stay of twenty (20) days from the date of this Order be, and hereby is, granted to enable the Federation to seek a stay in the United States Court of Appeals.

/s/ NORMA HOLLOWAY JOHNSON
NORMA HOLLOWAY JOHNSON
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-5239

KOKECHIK FISHERMEN'S ASSOCIATION, ET AL.

v.

SECRETARY OF COMMERCE, ET AL.

FEDERATION OF JAPAN SALMON FISHERIES
COOPERATIVE ASSOCIATION, APPELLANT

AND CONSOLIDATED CASE NOS. 87-5240, 87-5241,
87-5242, 87-5243, 87-5248 AND 87-5249

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Entered Feb. 16, 1988]

JUDGMENT

Before: Ruth B. Ginsburg and Starr, Circuit Judges, and Gesell,* District Judge

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* Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a).

These causes came on to be heard on the records on appeal from the United States District Court for the District of Columbia, and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the judgment of the District Court appealed from in these causes is hereby affirmed and these cases are remanded, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
For the Court

/s/ CONSTANCE L. DUPRE
Constance L. Dupre
Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-5239

KOKECHIK FISHERMEN'S ASSOCIATION, ET AL.

FEDERATION OF JAPAN SALMON FISHERIES
COOPERATIVE ASSOCIATION, APPELLANT

v.

SECRETARY OF COMMERCE, ET AL.

[Filed May 11, 1988]

ORDER

Before: Ruth B. Ginsburg and Starr, Circuit Judges, and Gesell,* District Judge, United States District Court for the District of Columbia.

This matter is before the court for consideration of the Motion for Stay and the Petition for Rehearing of the Federal Appellants and of the Motion for Stay and the Petition for Rehearing of the Federation of Japan Salmon Fisheries Cooperative Association (Federation). Upon consideration thereof, it is

ORDERED, by the Court, that the motions for stay are denied, and it is

FURTHER ORDERED, by the Court, that the petitions for rehearing are denied.

For The Court:

Constance L. Dupre, Clerk

BY: /s/ ROBERT A. BONNER

Robert A. Bonner
Deputy Clerk

Circuit Judge Starr would grant the petitions for rehearing and the motion for stay of the Federation.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-5239

KOKECHIK FISHERMEN'S ASSOCIATION, ET AL.

FEDERATION OF JAPAN SALMON FISHERIES
COOPERATIVE ASSOCIATION, APPELLANT

v.

SECRETARY OF COMMERCE, ET AL.

[Filed May 11, 1988]

ORDER

Before: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg and Starr, Silberman, Buckley, Williams, D.H. Ginsburg and Sentelle, Circuit Judges.

The suggestions for rehearing *en banc* of the Federal Appellants and the Federation of Japan Salmon Fisheries Cooperative Association have been circulated to the full court. The taking of a vote thereon was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the suggestions. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc,* that the suggestions are denied.

For The Court:

Constance L. Dupre, Clerk

BY: /s/ ROBERT A. BONNER

Robert A. Bonner
Deputy Clerk

Circuit Judges Starr, D.H. Ginsburg and Sentelle would grant the suggestions for rehearing *en banc.*

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Supreme Court, U.S.
FILED
SEP 28 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-428

In the Supreme Court of the United States

OCTOBER TERM, 1988

C. WILLIAM VERITY, JR., SECRETARY OF COMMERCE, ET AL., PETITIONERS

v.

CENTER FOR ENVIRONMENTAL EDUCATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF BY RESPONDENT FEDERATION OF JAPAN SALMON FISHERIES COOPERATIVE ASSOCIATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeals err when it refused to adopt an abuse-of-discretion standard to review whether the Department of Commerce must in every instance deny a permit for the incidental taking of one stock of marine mammals that meets the statutory criteria for a permit under the Marine Mammal Protection Act, 16 U.S.C. (& Supp. IV) § 1361 *et seq.* ("MMPA") in order to deal with the inevitable incidental take of an environmentally negligible number of animals from another stock not covered by the permit, where (a) denial of a permit in such circumstances is not a remedy specified in the MMPA, (b) the MMPA does not address the issue, (c) the agency has determined to use remedies specified in the MMPA, (d) the agency's approach is supported by a Congressionally-appointed watchdog agency, and (e) the agency's approach maximizes the overall attainment of the goals under the MMPA?

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No. 88-428

IN THE

Supreme Court Of The United States

October Term, 1988

C. WILLIAM VERITY, JR., SECRETARY OF COMMERCE, ET AL., PETITIONERS

v.

CENTER FOR ENVIRONMENTAL EDUCATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF BY RESPONDENT FEDERATION OF JAPAN SALMON FISHERIES COOPERATIVE ASSOCIATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

STATEMENT

On February 16, 1988, a sharply divided Court of Appeals (Judge Starr dissenting) ruled that over a decade of Department of Commerce regulatory policy should be overturned and enjoined. (App., 1a-31a.)[1]

[1] "App., __" refers to the Appendices to the petition for writ of certiorari by petitioners C. William Verity, Secretary of Commerce, *et al.*

Judge Starr's dissent (App., 17a-31a) stresses that the "counter-intuitive" majority opinion overturns a regulatory regime that is "undeniably *maximizing* the overall goal of the [Marine Mammal Protection] Act[2] to reduce or eliminate marine mammal takings." The "overall result" of the majority decision "may very well be, ironically, reduced protection for marine mammals." In addition, the majority opinion will produce "the odd outcome of calling a complete halt to important fishing operations with clear foreign policy implications." (App. 18a, 27a.) (Emphasis in original.)

The question arises: if the Court of Appeals decision has such a bizarre result did the Court review the agency's policy under the wrong standard of review?

The agency policy is that the Department of Commerce will use enforcement discretion concerning a permit for the taking of one stock of marine mammals incidental to commercial fishing operations where an environmentally insignificant number of other animals are unintentionally taken. This policy dates back to at least 1977 and has been followed in virtually every incidental take permit proceeding under the MMPA since then. The agency policy has been endorsed by virtually everyone involved -- including the Department of Commerce, the Congressionally-created watchdog Marine Mammal Commission,[3] numerous environmental groups (including three of the environmental respondents here),[4] Congress, and courts. Can the agency's reading of the statute be impermissible when so many responsible entities have read it the same way for over a decade?

In the rulemaking proceeding here the agency, after carefully evaluating the effect on stocks, weighing the statutory con-

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[2] 16 U.S.C. (& Supp. IV) § 1361 *et seq.* ("MMPA").

[3] "It was Congress' intention that the Marine Mammal Commission should play a significant advisory role in the protection of marine mammals." *Committee for Humane Legislation v. Richardson*, 414 F. Supp. 297, 304 n. 16 (D.D.C.), *aff'd*, 540 F.2d 1141 (D.C. Cir. 1976).

[4] The Sierra Club, Humane Society of the United States, and Animal Protection Institute.

siderations in the MMPA, and following the advice of the Marine Mammal Commission, determined to grant a permit for Dall's porpoise and to issue fines for the environmentally negligible accidental take of other animals. 52 Fed. Reg. 19874 (May 28, 1987). Such fines are one of the discretionary remedies in the MMPA. See 16 U.S.C. §§ 1374-75.

The agency's policy was overturned by the District Court (Norma Holloway Johnson, J.) (App., 32a-59a), and a divided Court of Appeal's affirmed (App., 1a-31a). The Court of Appeals majority refused to apply an abuse-of-discretion standard to review the agency's policy and, without regard to the reasonableness of the agency's approach, ruled that a permit could not be granted for one stock (Dall's porpoise) that meets the statutory criteria for a permit where even a few animals from another stock not covered by the permit would be taken. In the light of the extremely broad definition of "take"[5] this would preclude issuance of a permit where there would be even a momentary, unintentional and non-injurious restraint of a few animals not covered by the permit.

The Department has petitioned for Supreme Court review. The Federation of Japan Salmon Fisheries Cooperative Association, which is the applicant for renewal of the permit that had been in effect since 1981, urges that the writ be granted.

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[5] The MMPA defines "take" to mean "to harass, hunt, cpature or kill, or attempt to harrass, hunt, capture or kill any marine mammal." 16 U.S.C. § 1362(12). The term "harrass" includes "the restraint or detention of a marine mammal, no matter how temporary." 50 C.F.R. § 216.3 (1986).

> remarkable remedy that the District Court has chosen to craft here and that the court today affirms --that is, an injunction against issuing a permit for the taking of one species when another, for which no permit may lawfully issue, will inevitably be taken." (App., 23a n.5.)

Even the statutorily-provided remedies (16 U.S.C. §§ 1374-75) are discretionary. And an amendment offered in the Senate in 1972 to make the enforcement provisions more stringent was rejected.[8] Furthermore, the approach adopted by the agency was with the full concurrence of the Congressionally-created watchdog Marine Mammal Commission.

B. The Decision Of The Court Of Appeals Should Be Reviewed Because Of Its Severe Environmental And Foreign Policy Implications.

There are compelling public policy reasons for Supreme Court review of this case. The decision halts a longstanding general enforcement policy based upon a solid consensus concerning proper international management of marine resources. And does so where the result will be lessened protection for marine mammals and other policies sought to be advanced by the MMPA.

As stressed by Judge Starr:

> "[T]he result of today's decision raises the danger that the Japanese will terminate their treaty obligations under the INPFC. The overall result may very well be, ironically, reduced protection for marine mammals, if the Japanese fleet withdraws from fishing activity subject to NOAA regulation. That unhappy state of affairs would be but another testament to the recurring reality of unintended consequences." (Starr, J., dissent, App., 27a.)

In that regard, the decision jeopardizes a multilateral conservation regime among the United States, Japan, and Canada, pur-

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[8] 118 Cong. Rec. 25269-70, 25290 (July 25, 1972).

suant to a treaty under which since 1952 the parties have strived for the conservation of marine resources in the North Pacific and Bering Sea, including marine mammals and salmon of North American origin. International Convention for the High Seas Fisheries of the North Pacific, 4 U.S.T. 2786, as amended, 38 U.S.T. 10095, T.I.A.S. No. 9242 ("INPFC"). Under the INPFC, the Japanese give up large areas of fishing *outside* the United States 200-mile exclusive economic zone ("EEZ") in return for fishing in a relatively small area *inside* the United States' EEZ. The MMPA "specifically directs the agency to take cognizance of U.S. treaty obligations," 16 U.S.C. § 1373(b)(2). (Starr, J., dissent, App., 27a.)[9] The majority opinion refuses to take such considerations into account:

> "Today, the court features only the first factor [in § 1373(b)] in its analysis. The agency, in contrast, is not at leisure to stop at factor number one, for it has a statutory duty to consider all five. The agency, in short, cannot call it a day upon completing only one-fifth of the Congressionally ordained exercise." (Starr, J., dissent, App., 27a.)

The agency's longstanding enforcement approach at issue here has been an essential part of the basic understanding upon which Japan agreed under the INPFC to give up additional rights to fish outside the United States EEZ in order to provide further protection for marine resources. An essential element of that agreement was that the Japanese high seas salmon fleet continue to be allowed to operate inside the United States EEZ. Denying

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[9] The MMPA requires the agency to give "full consideration" to the following factors in administering the permit system:

> "(1) existing and future levels of marine mammal species and population stocks;
> (2) existing international treaty and agreement obligations of the United States;
> (3) the marine ecosystem and related environmental considerations;
> (4) the conservation, development, and utilization of fishery resources; and
> (5) the economic and technological feasibility of implementation." 16 U.S.C. § 1373(b).

the Japanese the right to operate inside will undermine their basis for remaining in the INPFC, resulting in potentially reduced protection of marine mammals and salmon of North American origin. Collapse of the INPFC would mean that the Japanese would not be subject to international regulation outside the United States EEZ. They could return to fishing for salmon closer to the EEZ and substantially increase their fishing activity. This would reduce the protection both to marine mammals and to United States-origin salmon as well as be counterproductive to the interests of conservation of marine resources and to the interests of the United States. As the agency well understood when it determined to grant the permit to the Federation, such a result is contrary to the interests sought to be promoted by the MMPA and the North Pacific Fisheries Act, 16 U.S.C. (& Supp. IV) § 1021 *et seq.* (which implements the INPFC).

As recognized by the agency, the international environmental regime produces greater protection for marine resources than does unregulated fishing outside the United States EEZ. Allowing the Japanese to continue regulated fishing inside the United States EEZ would mean that the "Japanese fisherman would continue to abide by area closures outside the U.S. EEZ, provided in the INPFC Agreement, thereby protecting marine mammals and salmon of North American origin in these areas." (NOAA Draft Environmental Impact Statement, Exh. NOAA-12, p. 62.)

Conversely, as stated by the Administrative Law Judge in the permit proceeding:

> "Not issuing a permit would not stop the operation of this gillnet fishery, and thus would not stop the taking of fur seals, Dall's porpoise, any other marine mammal, seabirds, or salmon of American origin. Not issuing a permit would result in the continued taking of these animals, but without the United States having any leverage to control this fishery. Thus, *bearing in mind the prime consideration of the best interests of the marine mammals involved, a regulated mothership fishery poses much less of a threat than does an unregulated one. This*

> *also accords with the provisions of the international accords dealing with living natural resources and marine mammals in particular.*" (Emphasis added.) (ALJ Recommended Decision 36.)[10]

And, as the Final Environmental Impact Statement in the permit proceeding stresses (at p. 14),[11] the failure to issue a permit will have the ancillary consequences of "loss of opportunity to study Dall's porpoise and assess impacts; lack of resolve of other parties to agree on an INPRO/PICES accord; and loss of Japanese markets to U.S. salmon and salmon products."

An affidavit filed by the State Department in this case demonstrates the importance of overturning the Court of Appeals interpretation. (Affidavit of Edward E. Wolfe, Deputy Assistant Secretary of State for Oceans and Fisheries, executed June 23, 1987.)[12] The State Department indicates that the INPFC agreement protects North American salmon stocks and marine mammal stocks, even beyond the United States EEZ. If the fishery relationship with the INPFC were disrupted, "it could result in North American salmon conservation schemes being irreparably damaged. It could also result in even greater losses of marine mammals than at present." (Wolfe Aff., ¶ 4.) The State Department concludes with the opinion the Court of Appeals decision could "eradicate[]" "the significant gains made by the United States in conserving North American origin salmon and protecting marine mammals in the North Pacific and Bering Sea." (*Id.*, ¶ 7.)

An affidavit filed in this case by NOAA's chief scientist on the Dall's porpoise program also makes clear the damage to important environmental research that would be caused by the Court of Appeals decision. (Affidavit of Dr. Linda Jones, executed June 19, 1987.)[13] As stated in Dr. Jones' affidavit, under the INPFC,

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[10] Appendix of Appellant Federation of Japan Salmon Fisheries Cooperative Association in the United States Court of Appeals for the District of Columbia Circuit 288.

[11] *Id.* 144.

[12] *Id.* 44.

[13] *Id.* 50.

the United States and Japan have collaborated on a series of scientific programs designed to reduce marine mammal mortality. Disruption of this type of research would work to the disadvantage of the marine mammals. Research on marine mammals could continue as long as the INPFC is maintained.

> "However, Article X of the [INPFC] Protocol has been implemented by a Memorandum of Understanding between the U.S. and Japan which sets forth the details of the cooperative research program on marine mammals. By its terms, the Memorandum of Understanding concerning Dall's porpoise research signed on June 8, 1987 by Japan and the U.S. is effective only so long as the Japanese are permitted to fish in the U.S. EEZ. If no permit is in effect, then the research covered by the Memorandum of Understanding to assess the Dall's porpoise incidental take and status of stocks would cease.
>
> Without an agreement, there would be no monitoring of incidental take of marine mammals, seabirds, or chinook salmon aboard commercial salmon vessels, and probably also not on board Japanese salmon research vessels." (Jones Aff., at ¶¶ 4-5.)

She also stresses that without information gathered by observers, the United States has no means of determining the incidental take level of marine mammals and seabirds in any of the high seas gillnet fisheries, "and thus has no means of determining the status of the porpoise stocks which would continue to be affected by the land-based salmon and squid gillnet fisheries as well as by the mothership salmon fishery when it operates outside the U.S. EEZ." *Id.*, ¶ 5. The Court of Appeals decision would also adversely affect evaluation of modified nets, collection of biological samples, and research in other Japanese fisheries. *Id.*, ¶¶ 6-9.

Laws passed since the MMPA was enacted in 1972 fully recognize the benefits of continuing to allow the Japanese fleet to fish within the United States EEZ. This was vividly illustrated when the North Pacific Fisheries Act of 1954 (16 U.S.C. §§ 1021-

35), which implements the INPFC, was amended in 1978 to reflect the amended Convention and Annex. The Senate Report acknowledged that the new measures greatly limit the total ocean area available to the Japanese fleet and provide a high degree of protection to United States origin salmon. The Report recognized that the measures permit the Japanese to fish for a limited period in a small area inside the United States EEZ, "but the fish caught there are of Asian origin, and in exchange for this the Japanese agreed not to fish in areas roughly 10 times as large outside the U.S. fishery zone." The Report went on to say that the alternative would be to close the United States EEZ to the Japanese fleet, which would not be beneficial for the conservation of marine resources:

> "[T]his would allow the Japanese complete freedom to fish the vast areas of the North Pacific beyond our zone. In addition, simple closure of our 200-mile zone would have permitted the Japanese to concentrate unlimited amounts of fishing effort in rich salmon fishing areas just outside our 200-mile zone." S. Rep. No. 924, 95th Cong., 2d Sess. 4, *reprinted in* 1978 U.S. Code Cong. & Admin. News 1080, 1083.[14]

The decision of the Court of Appeals has the perverse effect of going directly against these policies.

C. The Agency's Approach Would Have Been Sustained Had The Court Of Appeals Adopted A Proper Standard Of Review.

The agency's approach was eminently reasonable and would have been sustained had the Court of Appeals reviewed it under the applicable abuse-of-discretion standard.

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[14] The House Report came to a similar conclusion, stating that there were "substantial benefits" to renegotiating the Convention to move the abstention line, establishing the eastern limit and permitting Japanese fishing activities for salmon within the United States EEZ. It stated that exclusion of the Japanese from the United States EEZ and the collapse of the Convention would mean that the Japanese mothership fleet would have access to North American salmon in the

1. NOAA's Enforcement Policy Is A Reasonable Reconciliation Of The Policy Objectives Of The MMPA.

The MMPA reflects a number of policy objectives that inform NOAA in its administration and enforcement of the Act. The enforcement approach adopted by NOAA is a reasonable approach that fully considers and accommodates these objectives. The Court of Appeals decision ignores these considerations. As pointed out by Judge Starr, the MMPA requires the agency to consider a number of factors, but the Court of Appeals takes into account only one of them. (Starr, J., dissent, App. 26a-27a.)

For example, the Act states that "negotiations should be undertaken immediately to encourage the development of international arrangements for research on, and conservation of, all marine mammals ...." 16 U.S.C. § 1361(4). The Act further instructs the Secretary to prescribe "on the basis of the best scientific evidence available and in consultation with the Marine Mammal Commission," regulations relating to taking "as he deems necessary and appropriate ... [and] consistent with the purposes and policies" of the Act. 16 U.S.C. § 1373(a). Among the factors the Secretary must consider in prescribing these regulations are "existing and future levels of marine mammals species and population stocks," 16 U.S.C. § 1373(b)(1), "existing international treaty and agreement obligations of the United States," *id.* § 1373(b)(2), and "conservation, development and utilization of fishery resources," *id.* § 1373(b)(4). It is thus entirely proper for the agency's enforcement regime to be designed to take into account these important goals. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., supra,* 467 U.S. at 865. The Court of Appeals ignored many of such statutory considerations. It never even mentions the endorsement of the agency's approach by the Marine

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Gulf of Alaska and that, according to United States scientists, an estimated 16 million North American salmon could be taken in the Gulf east of the existing abstention line and beyond the United States EEZ. (H.R. Rep. No. 1194, 95th Cong., 2d Sess. 10-11 (1978).)

Mammal Commission, which was intended by Congress to "play a significant advisory role" under the MMPA.[15]

Thus, in the light of the foregoing statutory provisions, NOAA was fully entitled to conclude that its enforcement regime should take into account that it is more harmful to ban the Japanese fishery from the United States EEZ, resulting in destablilization of the international conservation regime and potential loss of United States control over the Japanese fishery, than to maintain the regime through other available enforcement measures, such as the penalties Congress has authorized under the MMPA. The Marine Mammal Commission, which has a special statutory advisory duty in assuring the protection of marine mammals (16 U.S.C. § 1401), specifically supported the issuance of this permit for Dall's porpoise even though a small number of animals from other stocks would not be covered by the permit.

The agency reached its determination to grant a permit for Dall's porpoise only after the most careful analysis of the effect of fur seals and other stocks, taking into account the concurrence of the Marine Mammal Commission, and reasonably determining that granting the permit would not be to the disadvantage of stocks and would be the environmentally preferred alternative. Under the abuse-of-discretion standard of review that should properly have been followed by the panel majority, the agency's decision should have been reviewed to determine whether in the circumstances of the case the agency acted reasonably in determining to grant the permit.

2. The Legislative History And Other Authority Support The Agency's Exercise Of Discretion Here.

The agency's position is fully supported by legislative history and other relevant authority. *See Chemical Manufacturers Association v. NRDC, supra*, 470 U.S. at 126 (resort to legislative history in *Chevron*-type analysis). These demonstrate that Congress

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[15] *Committee for Humane Legislation v. Richardson, supra*, 414 F. Supp. at 304 n. 16.

has recognized the need to give this expert agency substantial flexibility in administering the MMPA. The agency's interpretation also plainly manifested itself in connection with every major proceeding on an incidental take permit for more than 10 years, which were closely monitored by vigilant Congressional committees, in reports to Congress, and in Federal Register notices, and was supported by virtually everyone who reviewed the issue. The universality of agreement to the agency's approach indicates that it reflects a permissible reading of the MMPA. The Court of Appeals ignores these important authorities.

a. House. During Congressional consideration that lead to the MMPA, a number of bills to create a flat prohibition on the taking and importing of marine mammals with a few relatively minor exceptions was opposed by the Executive Branch as "too restrictive and unworkable." H. Rep. No. 707, 92d Cong. 1st Sess. 12 (1971). An alternative proposal, H.R. 10240, was introduced by Reps. Anderson (of San Pedro, California, home of commercial fishing interests), Pelly, and others, which was designed to give the agency "*more flexible authority.*" *Id.* (emphasis added). The Committee (which reported out the H.R. 10240 with an amendment) adopted this approach because it was

> "the strong feeling of the Committee that the answers to these problems lie not in abolition of the concept of management, but rather in making the management that does not take place *more responsive to the true needs of the situation.*" *Id.* at 19 (emphasis added).

The floor debate on H.R. 10420 provides further support for the agency's approach.[16]

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[16] Rep. Dingell, the Chairman of the Subcommittee, spoke in support of the bill, stating that the bill rejects the "protectionist" approach. Instead, H.R. 10420 favors "enlightened effective management of marine mammals." 117 Cong. Rec. H44951 (Dec. 6, 1971). Rep. Pelly, the ranking minority member of the Committee, stressed that the bill contained "a properly balanced species management approach" that would give the regulatory agencies "flexibility." 118 Cong. Rec. H7687 (March 9, 1972). See also 117 Cong. Rec. H44956 (Rep. Goodling).

b. Senate. The report of the Senate Committee on Commerce, as did the report of the House Committee, indicated support for a reasonable management approach. It concluded that "the best answer to questions on the conservation of marine mammals must be the application of scientific principles and knowledge separately for each species of marine mammals." S. Rep. No. 863, 92d Cong., 2d Sess. 5 (1972). It went on to speak of the duty of "managing them wisely at an international level." *Id.* 6. (Emphasis added.) The Senate debate also stressed the need for flexible management.[17]

c. Oversight hearings. After the passage of the MMPA oversight hearings were held at which Congressman Dingell stated that a "rule of reason" would be applied concerning the operation of the Act with respect to the taking of marine mammals and that "[i]t was not our intention that commercial fishing be brought to a halt."[18]

d. 1976-77 administrative proceedings. In late 1976 and early 1977, NOAA conducted an MMPA permit proceeding (Doc. No. MMPA-1976-2) during which counsel representing over a dozen environmentalist groups, including three appellees here (*see* note 4, *supra*), confirmed that a finding of depletion of one stock would not prevent the issuance of the permit an incidental take of other stocks despite the fact that fishing operations would inevitably, although unintentionally, result in the taking of

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[17] Senator Hollings, Chairman of the Subcommittee and manager of the bill on the Senate floor, stressed the need for "room for management decisions on taking and imports;" otherwise, governments of foreign nations, including Japan, "will not be interested in bargaining with us to protect marine mammals." 118 Cong. Rec. S25256 (July 25, 1972). He praised NOAA's "careful wildlife management" program for Pacific fur seals, *id.* S25253, which "is consistent with the principle that *conservation programs should be flexible and responsive to changing ecological conditions*." *Id.* S25256 (emphasis added). Senator Stevens, the ranking Republican on the Subcommittee, stressed the need for NOAA's expertise in carrying out our effective marine mammal management program. *Id.* S25276.

[18] Hearings on Oversight of the Marine Mammals Protection Act of 1972 before the Subcomm. on Fisheries and Wildlife Conservation, 93rd Cong. 2d Sess., ser. 92-24, at 22 (1974).

some animals from that depleted stock.[19] The Administrative Law Judge agreed with this approach.[20]

e. 1977 Congressional hearings. Prior to and directly after issuance of the agency's final decision in 1977 in the permit proceeding, oversight hearings were held at which NOAA made it clear that the taking of depleted stocks not covered by a permit would be a matter of agency enforcement discretion.[21] In response, the Chairman of the Subcommittee, Representative Leggett, asserted that NOAA had taken "a reasonable approach," and that he was "concerned that we explore this and get this history on the record as to exactly what we are contemplating in these regulations."[22] The Marine Mammal Commission's general counsel endorsed NOAA's approach.[23] So did the participating environmental groups.[24]

f. Proceedings before the Court of Appeals. On March 2, 1977, Attorney General Griffin Bell on behalf of the agency requested the Court of Appeals for the District of Columbia Circuit to grant emergency relief that would allow NOAA immediately to

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[19] *See* Environmental Defense Fund *et al.*'s Opening Brief on Proposed NMFS 1977 Regulations on Incidental Take of Porpoise during Yellowfin Tuna Purse Seine Fishing Operations, Dec. 17, 1976, at 24, 66.

[20] 1977 NOAA Recommended Decision, MMPAH No. 2-1976, at 97.

[21] *Hearings before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 95th Cong., 1st Sess. at 22-23, 176, 182, 185, 188 (Dr. Robert M. White, Administrator of NOAA) (1977) (hereinafter "*Hearings*").

[22] *Id.* 185. The views of Rep. Leggett have been given particular weight concerning the meaning of the MMPA. *Committee for Humane Legislation v. Richardson*, *supra*, 540 F.2d at 1149.

[23] *Hearings* 247-48.

[24] Counsel for the Environmental Defense Fund stated as follows on behalf of several environmental groups:

> "Intent (*scienter*) is an element to be considered in determining to apply the civil and criminal penalties of any statute, including this one, absent specific language to the contrary. If observers and captains make infrequent and ultimately insignificant errors in failing to identify Eastern Spinners travelling with other species, and set upon them

implement its program for fishing that would result in the incidental taking of marine mammals even though agency work on the 1977 permit was not completed. During the court hearing on the request, the fact that depleted marine mammals not covered by the permit would inevitably be taken was made very clear to the Court.[25] The next day, despite its knowledge that there would be an inevitable take of a depleted stock, the Court of Appeals granted the government's motion to allow taking of marine mammals pursuant to an interim regime, including the 1977 regulations, until the permit was issued or April 30, 1977, whichever would occur first. *Fund for Animals v. Kreps*, No. 76-2168 (D.C. Cir. 1977).

With these various assurances the agency proceeded to publish its enforcement policy that an accidental take of the depleted eastern spinner is not a cause of issuing a notice of violation. 42 Fed. Reg. 22557, 22575 (May 4, 1977).

g. Subsequent judicial decisions. The approach by the Court of Appeals in *Fund for Animals v. Kreps, supra*, supplied a basis for subsequent court decisions upholding permits despite a take of marine mammals not covered by the permits.

--In 1977, an environmentalist group challenged NOAA's 1977 regulations and the permit. Counsel for the petitioner objected to the agency's enforcement policy relating to the taking of depleted stocks.[26] Despite this argument, the Court held that the

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> accidentally, the NMFS has already gone on record as saying it will be understanding, providing every effort is subsequently made to permit the mammals to escape alive."
>
> • • •
>
> We ourselves have recognized the impossibility of avoiding occasional mistakes by advocating unintentional accidental take of Eastern Spinners up to 6,500, specifically to take account of the 7 percent margin of possible error." (*Hearings* 195; *see id.* 198-99.)

See also *id.* 213 (Monitor, Inc.); *id.* 266-267 (National Wildlife Federation).

[25] *Fund for Animals v. Kreps*, No. 76-2168 (D.C. Cir. 1977) (Transcript of March 2, 1977 hearing at 67-68.)

[26] *Committee for Humane Legislation v. Kreps*, Civ. Action No. 77-0564 (D.D.C., decided June 30, 1977) (Transcript 8).

regulations and permit "comply in all respects with requirements of the statute for regulations and a permit" and that "the methods of enforcement of the established quotas prescribed in the regulations and the permit, again, are reasonable and supported by substantial evidence."[27]

--Thereafter, the District Court continued to uphold the grant of permits even though there were animals taken from stocks not under the permit. *Friends of Animals v. Baldrige*, Civ. Action No. 81-1547 (D.D.C., decided May 18, 1982); *Friends of Animals v. Roe*, Civ. Action No. 80-2870 (D.D.C., decided July 31, 1981). The *Baldrige* decision upheld the Federation's permit that was granted in 1981.

h. Congressional endorsement. The agency's enforcement policy was repeatedly made known to Congress both by the agency and by the Marine Mammal Commission. In 1982, Congress amended the NPFA to extend the permit granted by the agency to the Federation, despite the fact that it was known that animals not covered by the permit would be taken. Pub. L. No. 97-389, 96 Stat. 1949. This was Congressional ratification of the agency's policy.[28]

D. The Decision Of The Court Of Appeals Is In Conflict With The Law In Another Circuit.

The majority opinion also merits review because it is contrary to a decision of another Circuit (sitting *en banc*) upholding

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[27] *Id.* 44, 48.

[28] "It is *this* permit, which assumes that other, nonpermitted mammals would also be taken (notwithstanding the moratorium), that Congress itself extended in amending the North Pacific Fisheries Act of 1954, 16 U.S.C. § 1021 et seq. ("NPFA"). History thus teaches us that both Congress and the agency charged with administering the MMPA contemplated that permits would be issued in circumstances in which nonpermitted takings would inevitably occur." (Emphasis in original.) (Starr, J., dissent, App., 21a.)

NOAA's discretion concerning enforcement approaches under the MMPA.[29]

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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September 1988

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[29] *Balelo v. Baldrige*, 724 F.2d 753 (9th Cir.) (en banc), *cert. denied*, 467 U.S. 1252 (1984). The Court said, *inter alia*:

> "That some other remedial provision might be preferable is irrelevant. We have consistently held that where reasonable minds may differ as to which of several remedial measures should be chosen, courts should defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority." 724 F.2d at 761, quoting *Mourning v. Family Publications Serv. Inc.*, 411 U.S. 356, 371-72 (1973).

(3)

Supreme Court, U.S.
FILED
DEC 1 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-428

In The

Supreme Court of the United States

October Term, 1988

C. WILLIAM VERITY, JR., Secretary of Commerce, et al.,

Petitioners,

v.

CENTER FOR ENVIRONMENTAL EDUCATION, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF BY RESPONDENTS KOKECHIK FISHERMEN'S ASSOCIATION AND QALUYAAT FISHERMEN'S ASSOCIATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals correctly determined that the Marine Mammal Protection Act prohibits the Secretary of Commerce from issuing the Federation of Japan Salmon Fisheries Cooperative Association a general permit authorizing its members to set gillnets in the North Pacific Ocean portion of the United States 200-mile fishery conservation zone when, based upon uncontroverted evidence in the administrative record, the Secretary knows that, if he permits them to be set, the gillnets will entangle and drown fur seals, sea lions, Pacific white-sided dolphin, harbor porpoise, killer whale and other marine mammals in violation of the moratorium on taking set forth in the Act?

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STATEMENT

This case presents a simple question of statutory construction in a complex factual context.

Each spring millions of salmon fry hatch in the gravel of Alaska spawning streams, and then move down and out the mouth of their rivers of origin into the North Pacific Ocean where they spend two to six years before migrating home. Aware of this fact, as early as 1930 Japanese fishermen began fishing for Alaska salmon in the North Pacific Ocean with floating gillnets. *See generally* 98 Cong. Rec. A2987-89 (1952)(remarks of Rep. Tollefson *reprinting* Edward Allen, *The North Pacific Fisheries Treaty – Friendly Settlement of a 20-year Dispute*).

To stop the interceptions, in 1937 the Secretary of State negotiated an agreement with the Government of Japan (GOJ) pursuant to which GOJ agreed to prevent its nationals from gillnetting Alaska salmon. *Id.* However, independent of the agreement, the Second World War kept the Japanese fleet in port.

After the war, in 1952 the United States, Canada and GOJ entered into the International Convention for the High Seas Fisheries of the North Pacific Ocean, May 9, 1952, United States-Canada-Japan, 4 U.S.T. 380, T.I.A.S. No. 2786 (INPFC). As part of the INPFC, GOJ agreed that its nationals would not fish in the North Pacific Ocean east of 175° west longitude, the so-called "abstention line," west of which Alaska salmon were not thought to congregate. Although biologists soon determined that significant numbers of Alaska salmon were present west of the line, despite repeated requests by the United States that it do so, GOJ refused to renegotiate the INPFC. *See* 111 Cong. Rec. 12,698 (1965)(remarks of Senator Bartlett).

In 1972 Congress enacted the Marine Mammal Protection Act (MMPA). Pub. L. No. 92-522, 86 Stat. 1027 (codified as amended at 16 U.S.C. § 1361 *et seq.*).

Except to the extent authorized by statute or permit, § 101(a) of the MMPA, 16 U.S.C. § 1371(a), imposed a moratorium, i.e., "a complete cession," on all activities that would result in the taking of marine mammals, including takings that occur when marine mammals are entangled and drowned in gillnets. Although § 101(a) exempted commercial fishermen from compliance with the moratorium for two years, beginning in 1974 the MMPA required fishermen whose nets entangle and drown marine mammals to either obtain a permit authorizing them to do so or stop fishing.

Although the United States knew that gillnets set in the North Pacific Ocean by Japanese vessels fishing for salmon pursuant to the INPFC were entangling and drowning significant numbers of marine mammals, since MMPA jurisdiction stopped a few miles offshore, the Japanese fleet was not required to comply with the MMPA.

In 1976 the jurisdictional situation changed when Congress enacted the Magnuson Fishery Conservation and Management Act (MFCMA). Pub. L. No. 94-265, 90 Stat. 331 (codified as amended at 16 U.S.C. § 1801 *et seq.*). Section 102 of the MFCMA, 16 U.S.C. § 1812, asserted United States jurisdiction over fish inside a 200-mile fishery conservation zone (FCZ) surrounding the coastline of the United States. To conform MMPA jurisdiction over marine mammals to the jurisdiction the MFCMA asserted over fish, § 404 of the MFCMA, 16 U.S.C. § 1362 note, amended § 3 of the MMPA, 16 U.S.C. § 1362, to expand the definition of "waters under the jurisdiction of the United States" to include the FCZ. In the North Pacific Ocean the practical effect of the amendment was to subject Japanese vessels setting gillnets inside the FCZ to the moratorium on entangling and drowning marine mammals.

With respect to salmon fishing, the MFCMA created a legal anomaly. Section 201 of the MFCMA, 16 U.S.C. § 1821, limited foreign fishing for a fish stock to that portion of the optimum yield of the stock that would not be harvested by United States fishermen. Since United States fishermen were capable of harvesting the entire optimum yield of Alaska salmon stocks, by implication, the § 201 prohibited foreign fishing for salmon. However, the INPFC authorized Japanese vessels to gillnet millions of Alaska salmon inside the FCZ.

To resolve the conflict, § 202 of the MFCMA, 16 U.S.C. § 1822, instructed the Secretary of State to renegotiate the INPFC. As a result, in 1978 the United States, Canada and GOJ negotiated a treaty that superseded the MFCMA. The treaty authorized Japanese vessels to set gillnets inside the FCZ between June 10 and July 31 to catch Alaska and Soviet[1] salmon. Protocol Amending the International Convention for the High Seas Fisheries of the North Pacific Ocean, April 25, 1978, United States-Canada-Japan, 30 U.S.T. 1095, T.I.A.S. No. 9242.

The new treaty also contained a provision regarding compliance with the MMPA. As a result of the MFCMA amendment to the MMPA definition of the term "waters of the United States," the MMPA now prohibited Japanese vessels from setting gillnets inside the FCZ unless the vessels first acquired certificates of inclusion issued

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[1] Salmon of Alaska and Soviet origin commingle in the North Pacific Ocean. Ironically, each spring GOJ negotiates a fishery agreement with the Soviet Union in which the Soviets establish a quota on the number of salmon Japanese vessels may catch by species. While the United States, through the INPFC, allows Japanese vessels to fish inside the FCZ without cost, in addition to imposing quotas, the Soviet Union charges GOJ a multimillion dollar fee for the privilege of catching Alaska and Soviet salmon inside the United States FCZ.

pursuant to permits issued pursuant to § 104 of the MMPA, 16 U.S.C. § 1374.

Aware of the situation, GOJ negotiated a three-year exemption. In pertinent part, § 1(c) of the annex to the text of the 1978 version of the INPFC states:

> The requirement of the Government of the United States that Japanese fishing vessels engaged in this fishery have on board a Certificate of Inclusion relating to the incidental taking of marine mammals shall be suspended for the period ending June 9, 1981 during which period the Governments of Japan and the United States shall conduct joint research, shall cooperate to determine the effect of the Japanese salmon fishery on marine mammal populations, and shall work to reduce or eliminate the incidental catch of marine mammals in the fishery.

30 U.S.T. at 1111-12.

Shortly thereafter, Congress implemented the bargain GOJ had struck by amending the North Pacific Fisheries Act to exempt Japanese vessels from compliance with the MMPA until June 10, 1981. Pub. L. No. 95-326, 92 Stat. 399, 405 (1978). However, to ensure that GOJ and its nationals did not misconstrue Congress's intent, the amendment announced that: "After June 9, 1981, the taking of marine mammals incidental to fishing operations by Japanese vessels within the fishery conservation zone shall be regulated pursuant to the Marine Mammal Protection Act of 1972." *Id.*

Pursuant to § 104 of the MMPA, on January 19, 1981, the Federation of Japan Salmon Fisheries Cooperative Association (Federation)[2] submitted an application

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[2] The Federation is an umbrella organization whose membership includes the owners and operators of mothership processing vessels and catcherboats that fish for salmon in the North Pacific Ocean pursuant to the INPFC.

to the Secretary of Commerce (Secretary) that requested a permit authorizing its catcherboats' gillnets to take Dall's porpoise, fur seals, sea lions, harbor porpoise, Pacific white-sided dolphin and killer whales. 46 Fed. Reg. 10,785-88 (1981). After considering available data, the Secretary denied the application as to harbor porpoise, Pacific white-sided dolphin and killer whales. *Id.* However, after an administrative hearing, the Secretary issued the Federation a three-year permit to entangle and drown Dall's porpoise, fur seals and sea lions. 46 Fed. Reg. 27,056-68 (1981). The permit enabled Federation catcherboats to obtain certificates of inclusion that GOJ, through its agreement to the text of the annex to the 1978 protocol, had previously acknowledged were a condition precedent to fishing inside the FCZ.

At the Federation's request, in 1982 Congress amended the North Pacific Fisheries Act to extend the permit to June 10, 1987. Fisheries Amendments of 1982, Pub. L. No. 97-389, § 201, 96 Stat. 1949-50 (codified at 16 U.S.C. § 1034(b)).

On July 18, 1986, the Federation filed an application for a new permit. The application requested permission to annually take 5,500 Dall's porpoise, 450 fur seals and 25 sea lions. On December 1 through 7, 1986, an administrative law judge held a hearing on the application. In addition to the Federation and the Secretary, the Kokechik and Qaluyaat Fishermen's Associations (Kokechik) and a consortium of environmental organizations (CEE) participated as parties in the proceeding. On March 6, 1987, the judge recommended that the Secretary issue the Federation a permit authorizing its catcherboats to annually take 1,750 Dall's porpoise and 45 fur seals, with an annual five percent reduction in the porpoise

quota. On May 14, 1987, the Under Secretary of Commerce published a final decision which announced that the Secretary intended to issue the Federation a three-year permit authorizing its catcherboats to take a total of 6,039 Dall's porpoise. 52 Fed. Reg. 19,874-80 (1987).

Significantly, the decision indicated that the permit would not authorize Federation catcherboats to entangle and drown fur seals, sea lions, harbor porpoise, Pacific white-sided dolphin or killer whales, even though uncontroverted evidence presented during the hearing indicated that if the Secretary allowed Federation catcherboats to set gillnets inside the FCZ the nets would unlawfully entangle and drown the aforementioned species. Horoshi Ogiwara, an experienced Federation fleet commander, testified as follows:

MITCHELL: If for some reason the Federation should not be granted a permit to take Dall's porpoise, in your judgment as a mothership commander is there any way that your catcherboats could operate without taking Dall's porpoise to some extent?

OGIWARA: I think it is almost impossible.

MITCHELL: If for some reason the Federation were not granted a permit to take fur seals, is there anything that you could instruct your catcherboat captains to do to change the way they fish that could guarantee to the United States government that zero fur seals would be taken?

OGIWARA: As I stated before, it is extremely difficult to totally eliminate the incidental take. Therefore, in that event, it may be we can't continue the operation any longer.

MITCHELL: I don't want to be redundant, but this is important. Does that mean the

answer is that there is no way that you could guarantee to the United States government that your catcher-boats would not catch fur seals? Is that correct, yes or no?

OGIWARA: Well, if we are required that we can't take any animals then we can't continue the operation.

MITCHELL: And would that also be true if the animals that you had to guarantee that you absolutely would not take were sea lions?

OGIWARA: Well according to our experience, since 1981 the record indicates that only one sea lion was caught in one season. However, the sea lion is there in the waters where we are operating so that no matter how small that number is, as is indicated by the record, if there is one animal taken, then again we can't say that we will never take any animals.

Administrative Hearing Transcript at 501-02.

Dr. Linda Jones, the manager of the cetacean research program at the National Marine Mammal Laboratory and the Secretary's most knowledgeable witness on the subject, substantiated Captain Ogiwara's testimony:

MITCHELL: Having been on research vessels in the vicinity of the fishery do you believe that there is any way that a catcher-boat could knowingly avoid taking a harbor porpoise if it were in the general vicinity of where harbor porpoises are known to be?

JONES: No. It's a passive gill net.

Id. at 933.

In response to the final decision, the Federation, Kokechik and CEE filed petitions for review in the United States District Court for the District of Columbia, and

Kokechik filed a motion for a preliminary injunction. On June 15, 1987, the court granted Kokechik's motion and enjoined the Secretary from issuing the permit. *Federation of Japan Salmon Fisheries Cooperative Ass'n v. Baldrige*, 679 F. Supp. 37 (D.D.C. 1987). In so holding, the court first noted that:

> [T]he Secretary has interpreted the MMPA so as to allow him to issue a permit to the Federation to take one species of mammal, Dall's porpoise, for which the required finding of no disadvantage based on optimum sustainable population has been made, even though the Secretary knows other species will also be taken and as to those other species no such finding has been made.

Id. at 46.

The court then determined that the Secretary's interpretation of the MMPA contravened the express intent of Congress. According to the court:

> The MMPA imposes an absolute moratorium on all takings of marine mammals. The only way this moratorium may lawfully be ignored is through explicit Congressional action, as has been done for the Federation twice in the past, or by meeting the burden of proof necessary to allow the agency to find that a single taking will not disadvantage a particular stock because that stock is within the range of its optimum sustainable population. For the Secretary to issue a permit for only the Dall's porpoise, when it is clear that other marine mammals are certain to be taken yet no permit was issued for such mammals because a finding could not be or was not made, appears, at this juncture, clearly contrary to the MMPA.

Id. at 47.

On February 16, 1988, the United States Court of Appeals for the District of Columbia Circuit affirmed. *Kokechik Fishermen's Ass'n v. Secretary of Commerce*, 839 F.2d 795 (D.C. Cir. 1988). In so holding, the court explained its reasoning as follows:

> The MMPA effects a moratorium on the taking of marine mammals. Congress decided to undertake this decisive action because it was greatly concerned about the maintenance of healthy populations of all species of marine mammals within the the ecosystems they inhabit. Exceptions tc this moratorium clearly evidence a concern with the relationship between the activity engaged in and its effect on marine mammals and their ecosystem. It is the duty of the Secretary to take a systematic view of an activity's effect on marine mammals. A view that the permit process functions merely to determine which takes will be exempted from civil penalties is inconsistent with this duty because it allows – subject to the civil penalty price – illegal takings of other protected marine mammals. The Secretary has no authority, by regulation or other action, to issue a permit that allows conduct prohibited by that Act. Nonetheless, the Secretary chose to disregard these incidental takings [of fur seals, sea lions, harbor porpoise, northern right whole dolphin and Pacific white-sided dolphin] as "negligible," an undefined and ambiguous standard at best. The MMPA, however, does not provide for a "negligible impact" exception to its permitting requirements where incidental takings are not merely a remote possibility but a certainty.

Id. at 801-02.

With three dissenting votes, the circuit court denied petitions for rehearing *en banc*. And on June 9, 1988, this Court denied motions for a stay. As a result, Federation catcherboats did not set gillnets inside the FCZ during the 1988 fishing season.

REASONS THE PETITION SHOULD BE DENIED

1. The Circuit Court Correctly Interpreted the Intent of Congress.

Whether this Court should review the circuit court opinion is a matter of judicial discretion that should only

be exercised "when there are special and important reasons therefor." United States Supreme Court Rule 17. Although the subject matter is novel and the outcome of importance to the parties, this is not a special case. As the circuit court noted at the outset of its opinion, this action presents "a question of pure statutory interpretation." *Kokechik, supra* at 797. Questions of statutory construction are not unique. Each year the circuit courts routinely interpret the intent of Congress embodied in hundreds of statutes, and this case is no exception to the rule.

The Secretary argues to the contrary by asserting that the circuit court "departed from this Court's teachings in *Chevron U.S.A. Inc. v. N.R.D.C.*, 467 U.S. 837, 843 (1984)." Petition for Writ of Certiorari at 11. But contrary to the Secretary's protestation, the circuit court opinion is consistent with *Chevron*.

Chevron holds that if the text of a statute indicates that the intent of Congress is clear with respect to the subject at issue between the parties "that is the end of the matter; for the Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. If it is, an agency may not implement the statute in a manner different than Congress intended, even if implementing Congress's intent may produce a result the agency believes is bad policy, ill-conceived, wrong or plain stupid. As Chief Justice Rehnquist has observed: "[An agency] may not choose not to enforce laws of which it does not approve, or to ignore statutory standards in carrying out its regulatory functions." *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual*, 463 U.S. 29, 59 n. * (1983) (Rehnquist, J., concurring in part and dissenting in part).

In the instant action, after reading the text of the statute, three of the four judges who considered the question have concluded that Congress intended the MMPA to mean what it says, i.e., that the Act imposes "a complete cession" on the taking of *all* marine mammals and the Secretary may not permit activities to occur that he knows will result in the unlawful taking of marine mammals, even if the number of animals taken unlawfully is small.[3]

As Captain Ogiwara and Dr. Jones testified, if the Federation is issued a permit to take Dall's porpoise and

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[3] The subject of this action is the Secretary's decision to issue a permit. However, the Federation argues that the subject is the propriety of the exercise of enforcement discretion. Federation Brief in Support of Petition for Writ of Certiorari at 4-6. In a similar vein, the Secretary makes the startling assertion that permits authorize takings, not "fishing operations per se," and that the permit at issue here "does not authorize the Federation's fishing operations. It merely allows a specified number of incidental takings of one type of marine mammal (Dall's porpoise) in the event that the Federation engages in those fishing operations." Petition for Writ of Certiorari at 19. Among its other defects, the Federation's argument ignores the fact that the purpose of imposing civil penalties is to compel changes in conduct so that the conduct will stop producing unlawful results. However, as Captain Ogiwara and Dr. Jones testified, other than by not being set, there is no way catcherboat gillnets can avoid taking marine mammals in violation of the MMPA. The Secretary's argument is similarly defective. His own regulation requires each catcherboat to have a certificate of inclusion "aboard the vessel while it is engaged in fishing operations." 50 C.F.R. § 216.24(c)(3) (1987). But catcherboats may not be issued certificates until the Federation is issued a permit. Since the Secretary has been enjoined from issuing the Federation a permit and catcherboats have not been issued certificates of inclusion, during the 1988 season the catcherboats did not set gillnets inside the FCZ.

its catcherboats allowed to set their nets, the unlawful entanglement and drowning of fur seals, sea lions, harbor porpoise, Pacific white-sided dolphin, killer whales and other marine mammals in violation of the moratorium is unavoidable.[4] A result the Secretary has a nondiscretionary duty to prevent. *See* 16 U.S.C. § 1377(a).

But the Secretary denies that he has the duty. According to the Secretary, Congress has granted him authority to exercise administrative discretion, based upon his situational assessment of the public interest, to permit or not permit Federation catcherboats to set gillnets that he knows will entangle and drown marine mammals in violation of the MMPA. As his petition makes the argument:

> We do not, of course, suggest that the Secretary lacks discretion to consider the effects of commercial fishing activities on one species in deciding whether to issue a permit for the incidental taking of another by those same fishing activities . . . The Secretary contends only that the MMPA does not *compel* his denial of a permit for the taking of one species whenever a permit cannot be issued for another species potentially affected. (emphasis in original)

Petition for Writ of Certiorari at 17-18 n. 9.

In support of his interpretation of congressional intent, the Secretary relies on Judge Starr's dissent below. *Id.* at 15-20. However, with all due respect to Judge Starr,

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[4] The district court found Captain Ogiwara's and Dr. Jones' testimony determinative. According to the court: "Other than not setting their nets at all, there is nothing the captains and crews of Federation catcherboats can do to avoid entangling and drowning marine mammals and sea birds while fishing for salmon." *Federation of Japan Salmon Fisheries Cooperative Ass'n, supra* at 42.

his analysis is flawed. Judge Starr concluded that Congress has not considered the precise question raised in this action. Therefore, an intent should be imputed to Congress to allow the Secretary to implement the MMPA in whatever manner advances whatever policy choice he deems appropriate. But Judge Starr reaches this result not by reading the MMPA, but by reasoning that "one must in conscience wonder whether a reasonable Congress would have desired the odd outcome of calling a complete halt to important fishing operations with clear foreign policy complications." *Kokechik, supra* at 803-04.

What Judge Starr forgets is that Congress may adopt policies judges consider unreasonable. Like the Secretary, judges have no authority to correct Congress's errors. Their job is to discern and enforce Congress's intent, not second-guess its judgment. As the majority of Judge Starr's panel correctly concluded: "If it is appropriate to grant foreign commercial fishermen some leeway to take marine mammals incidentally in carrying out their commercial fishing operations for salmon, it is for the Congress, not the Secretary to decide." *Id.* at 802.

Judge Starr's construction also produces a result opposite the result Congress enacted the MMPA to achieve.

The Federation's permit application requested permission to take 5,500 Dall's porpoise, 450 fur seals and 25 sea lions. The Secretary determined that taking Dall's porpoise would be lawful, but that entangling and drowning fur seals and sea lions would be unlawful.

But what if he had found the reverse? What if the Secretary had determined that taking 450 fur seals and 25 sea lions would be consistent with the MMPA, but that

entangling and drowning 5,500 Dall's porpoise would not? In such a situation, would "a reasonable Congress" grant the Secretary authority to issue the Federation a permit for seals and sea lions to enable catcherboats to obtain certificates of inclusion authorizing them to set gillnets he knows will unlawfully entangle and drown thousands of porpoise when the unlawful takings could be prevented by not issuing the permit?

If the only difference between the two situations is the number of mammals taken unlawfully, then, as the circuit court correctly noted, in 1981 Congress made a clear policy choice: as discussed below, it authorized the Secretary to permit fishermen to take small numbers of marine mammals without complying with § 104 of the MMPA, if the fishermen are citizens of the United States and the mammals taken are not members of depleted populations.

And in 1988 Congress amended the MMPA to exempt United States fishermen and foreign fishermen other than the Federation from compliance with the prohibition on taking depleted populations.

Finally, the Secretary asserts that Judge Starr's interpretation of the MMPA has the benefit of not differentiating between permitting catcherboats to set gillnets the Secretary knows at the outset will unlawfully entangle and drown marine mammals, and the situation in which a permit is validly issued but, after the fishing begins, the quota for a particular marine mammal population included in the permit is reached. *See* Petition for Writ of Certiorari at 20-21. However, the two situations are not the same. In the first case, unlawful takings are inevitable. In the second, unlawful takings are only inevitable if,

when the quota is reached, the permittee refuses to stop fishing.[5]

But no matter what the Secretary believes the proper policy, the decision is not his to make. Deciding the proper balance between the national interest in protecting marine mammals and the Federation's interest in killing them is a choice Congress reserved to itself. And speaking through the text of the MMPA, Congress has decided that Federation catcherboats should not be allowed to set gillnets that will unlawfully entangle and drown fur seals, sea lions and other marine mammals, even in small numbers.

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[5] Pursuant to § 104(b)(2)(D) of the MMPA, 16 U.S.C. § 1374(b)(2)(D), the Secretary may condition issuance of a permit on compliance with whatever terms he deems appropriate. In the situation in which a permit authorizes a fishing vessel to take several marine mammal species and the quota with respect to the taking of one of the species is reached, the Secretary can require the vessel to stop fishing. Indeed, the Secretary imposed exactly that requirement on the United States tuna fleet. Because no quota for eastern spinner dolphin, a depleted species, was included in its permit, if a tuna boat captain observed eastern spinner dolphin in a school of porpoise commingled with tuna, the Secretary prohibited him from setting his net. *See* 42 Fed. Reg. 22,575 (1977). In 1984 Congress did what the Secretary could not: it allocated the tuna fleet a quota of 2,750 eastern spinner dolphin to enable the fleet to continue fishing when tuna and eastern spinner dolphin are commingled. Pub. L. No. 98-364, § 201, 98 Stat. 440, 441 (codified at 16 U.S.C. § 1374(h)(2)(B)(iii)(III)) (1984).

2. Legislative History Is Consistent with the Circuit Court's Interpretation of the Intent of Congress.

Since the intent of Congress in the text of the MMPA is clear, as this Court has instructed, "that is the end of the matter." *Chevron, U.S.A., Inc. v. N.R.D.C., supra* at 842. However, to whatever extent it may be relevant, the legislative history is consistent with the plain meaning of the text, and, when read in proper context, none of the snippets the Secretary and the Federation cite as contrary authority are inconsistent with that conclusion. The report of the Committee on Merchant Marine and Fisheries, for example, describes the limited authority Congress intended the MMPA to delegate the Secretary to allow marine mammals to be taken in violation of the moratorium. In pertinent part, the report states:

> Before *any* marine mammal may be taken, the appropriate Secretary must *first* establish general limitations on the taking, and must issue a permit which would allow *that* taking. *In every case,* the burden is placed upon those seeking permits to show that the taking should be allowed and will not work to the disadvantage of the species or stock of animals involved. If that burden is not carried – and it is by no means a light burden – the permit may not be issued. The effect of this set of requirements is to insist that the management of the animals be carried out with the interests of the animals as the prime consideration. (emphasis added)

H.R. Rep. No. 707, 92d Cong., 1st Sess. 18 (1971).

And in situations, such as the case at bar, in which protecting marine mammals and exploiting them for economic gain conflict, the committee instructed the Secretary to implement the MMPA "for their [i.e., the mammals'] benefit and not for the benefit of commercial exploitation." *Id.* at 22.

3. Congress Has Twice Ratified the Circuit Court's Interpretation of the MMPA.

According to his petition, Congress has "implicitly endorsed the Secretary's reading" of the MMPA. Petition for Writ of Certiorari at 20. In support of this assertion, the Secretary cites the 1982 enactment of a three-year extension of the Federation's 1981 permit. Fisheries Amendments of 1982, Pub. L. No. 97-389, § 201, 96 Stat. 1950-51 (codified at 16 U.S.C. § 1034(b))(1982). Since he knew when he issued the permit that catcherboat gillnets would entangle and drown harbor porpoise, Pacific white-sided dolphin, killer whales and other marine mammals that were not included in the permit, the Secretary reasons that Congress must have had the same knowledge. And since it knew, Congress would not have extended the permit unless it thought the result consistent with the MMPA.

However, Congress had no such knowledge.

The moratorium on taking marine mammals and the terms and conditions pursuant to which the Secretary would be authorized to allow takings in specific cases were the subject of exhaustive hearings. *Marine Mammals: Hearings on H.R. 690, et al., before the Subcomm. on Fisheries and Wildlife of the House Comm. on Merchant Marine and Fisheries*, 92d Cong., 1st Sess. (1971). *Ocean Mammal Protection: Hearings on S. 685, et al., before the Subcomm. on Oceans and Atmosphere of the Senate Comm. on Commerce*, 92d Cong., 2d Sess., Parts I and II (1972). They were reviewed and approved by two committees, H.R. Rep. No. 707, 92d Cong., 1st Sess. (1971); S. Rep. No. 863, 92d Cong., 2d Sess. (1972), debated, 117 Cong. Rec. 44,947-61 (1971); 118 Cong. Rec. 7,683-716, 25,246-300, 25,422-40 (1972), and renegotiated in a conference committee, H.R. Conf. Rep. No. 1488, 92d Cong., 2d Sess. (1972).

In contrast, in 1982 the Federation's permit was extended without hearings, without consideration by the

committees that exercise oversight jurisdiction over the MMPA, and with no debate. Rather, in the waning moments of the 97th Congress, Senator Packwood arranged for the Commerce Committee to discharge H.R. 3942, a bill that had previously passed the House. He then persuaded the Senate to pass, without a scintilla of debate,[6] a substitute for the House text of H.R. 3942 that, for the first time, included § 201, the section extending the permit. 128 Cong. Rec. 29,920-25 (1982). When H.R. 3942 returned to the House, rather than requesting the appointment of a conference committee or asking that the bill be referred to the Subcommittee on Fisheries and Wildlife Conservation and the Environment for hearings on § 201, Representative Breaux, the sponsor of H.R. 3942, moved the House to accept the Senate version of his bill. *Id.* at 30,050-57.

To assert that § 201 embodies the 97th Congress's "implicit endorsement" in 1982 of the Secretary's 1981 decision to allow Federation catcherboats to entangle and drown harbor porpoise, Pacific white-sided dolphin, killer whales and other marine mammals in violation of the moratorium the 92d Congress mandated in 1972 contravenes the facts.

What the facts reveal is that Congress has twice ratified the circuit court's interpretation of the MMPA.

In 1981 Congress amended § 101(a) of the MMPA to deal squarely with the matter that is the subject of the instant dispute between the parties: the

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[6] Senator Packwood's floor statement explaining his substitute for H.R. 3942 is preceded by a dot or "bullet." A bullet identifies a statement published in the Congressional Record that was not spoken by the member on the floor. Senator Packwood's remarks were submitted to the Congressional Record in writing *after* the Senate passed H.R. 3942.

taking of small numbers of marine mammals during the course of commercial fishing operations. In 1981 Representative Breaux decided that requiring permits issued pursuant to § 104 of the MMPA to engage in commercial fishing and other activities that would result in the take of small numbers of marine mammals was expensive and administratively cumbersome. Consequently, when he introduced H.R. 4084, a package of MMPA amendments, Representative Breaux included an amendment that authorized the Secretary to issue permits for the take of small numbers of marine mammals without requiring permit applicants to comply with § 104.

The text of the Breaux amendment read as follows:

> Permits may be issued by the Secretary for the taking of small numbers of marine mammals of species or population stocks that are not depleted. Such permits, which shall not be subject to § 104, shall require the permittees to comply with such reporting requirements regarding the taking as are deemed necessary by the Secretary.

Section 2, H.R. 4084, 97th Cong., 1st Sess. (July 9, 1981).

Had the amendment been enacted into law as introduced, in the instant case the Secretary could have issued the Federation a permit pursuant to § 104 to take Dall's porpoise, and then, pursuant to the Breaux amendment, included fur seals, sea lions and other marine mammals.[7]

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[7] This result assumes that fur seals, sea lions and other marine mammals that entangle themselves and drown in catcherboat gillnets are not members of depleted populations. In fact, at least three populations are depleted. The Secretary has declared Pribilof Island fur seals depleted, 53 Fed. Reg.

(Continued on following page)

But the Subcommittee on Fisheries and Wildlife Conservation and the Environment opposed this result. Although the subcommittee agreed that the Secretary should be given authority to authorize fishermen to take small numbers of nondepleted marine mammals without obtaining a § 104 permit, it limited the opportunity to do so to fishermen who are "citizens of the United States." H.R. Rep. No. 228, 97th Cong., 1st Sess. 2 (1981). The members of the Committee on Merchant Marine and Fisheries, and later the House and Senate, agreed with this result and enacted the subcommittee's substitute for the Breaux amendment into law. Pub. L. No. 97-58, 95 Stat. 979, 980 (codified at 16 U.S.C. § 1371(a)(4)) (1981).

Consequently, unless the Secretary lawfully issues the Federation a permit pursuant to § 104 that, in addition to Dall's porpoise, authorizes the take of fur seals, sea lions and other marine mammals the Secretary knows will entangle themselves and drown in catcherboat gillnets, Congress has required the Secretary to enforce the moratorium by preventing the nets from being set.

(Continued from previous page)

17,888-99 (1988), and announced his intent to declare sea lions depleted, 53 Fed. Reg. 16,299-301 (1988). With respect to Commander Island fur seals, the Secretary has determined that:

> Historic data indicate that 4 of 21 rookeries on the Commander Islands are now occupied and that the pre-exploitation population may have exceeded 1 to 1.7 million fur seals. If so, and if, as the parties have agreed, 60 percent of the pre-exploitation population represents the lower bound of OSP, the current population is most certainly well below OSP [i.e., depleted] even if it is stable or increasing.

52 Fed. Reg. 19,878 (1987).

The circuit court found the Breaux amendment, as enacted, a determinative expression of congressional intent. According to the court:

> The Secretary has no authority, by regulation or any other action, to issue a permit that allows conduct prohibited by that Act [i.e., the MMPA]. Nonetheless, the Secretary chose to disregard these incidental takings [of marine mammals other than Dall's porpoise] as "negligible," an undefined and ambiguous standard at best. The MMPA, however, does not provide for a "negligible impact" exception to its permitting requirements where incidental takings are not merely a remote possibility but a certainty.
>
> As enacted, § 1371(a)(4) [i.e., the Breaux amendment] creates a narrow exception for incidental, not intentional, takings having a negligible impact on the species involved "by citizens of the United States while engaging in commercial fishing operations, ..." The Secretary is not authorized to extend this flexibility to the Japanese nor is he authorized to create a new undefined statutory exception under the heading of "negligible," which clearly has the effect of avoiding the strictures of the MMPA and congressional intent.

Kokechik, supra at 802.

Last and most definitively, on November 23, 1988, President Reagan signed the Marine Mammal Protection Act Amendments of 1988. Pub. L. No. 100-711, 102 Stat. 4755 (1988). The statute is important evidence that, as a matter of national policy, Congress has decided not to overturn the circuit court interpretation of the MMPA insofar as it applies to the Federation. *See Blau v. Lehman*, 368 U.S. 403, 412-13 (1962)(holding that Congress's refusal to amend a statute subsequent to a circuit court opinion interpreting its original intent is evidence that the circuit court interpretation was correct). *See also United States v. Bd. of Commrs. of Sheffield, Alabama*, 435 U.S. 110, 134 (1978) (holding that when, in amending a

statute, Congress voices approval of the statute's prior interpretation, Congress should be treated as having adopted the prior interpretation).[8]

Three months after the circuit court issued its opinion, the Subcommittee on Fisheries and Wildlife Conservation and the Environment held a hearing on H.R. 4189, a bill to reauthorize the MMPA, at which William Evans, Under Secretary of Commerce for Oceans and Atmosphere, testified as follows:

> The National Marine Fisheries Service (NMFS) has interpreted its authority under the MMPA to include discretion to issue permits for incidental taking if the populations covered by the permit are within OSP, without proving that all other species that might be taken are also within OSP. However, in a recent decision involving a permit allowing a take of Dall's porpoise incidental to the Japanese salmon fishery, the United States Court of Appeals rejected NMFS's interpretation. In a two to one decision, the court ruled that NMFS did not have the authority to issue a permit for Dall's porpoise since other marine mammals (such as the fur seal) which were not demonstrably at OSP also were likely to be taken.
>
> Unless this decision is overturned or Congress amends the Act, NOAA may not be able to renew the general permits to the U.S. domestic fishing industry

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[8] *Sheffield* involved the interpretation of the intent of Congress embodied in the Voting Rights Act of 1965. Pub. L. No. 89-110, 79 Stat. 437 (1965). Although the opinion speaks of the Voting Rights Act of 1975 having "re-enacted" the 1965 Act, the 1975 Act actually amended the 1965 Act. *See* Voting Rights Act of 1975, Pub. L. No. 94-73, 89 Stat. 400 (1975). The Marine Mammal Protection Act Amendments of 1988 bear the same relationship to the MMPA that the Voting Rights Act of 1975 bears to the Voting Rights Act of 1965.

> that expire at the end of 1988 because depleted species or species of unknown status might be taken.

Marine Mammal Protection Act Authorizations: Hearing on H.R. 4189 before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries, 100th Cong., 2d Sess. 216 (1988)(statement of William Evans)[hereinafter House Hearing].

Testifying on the Federation's behalf, Takenobu Takahashi, an official of the Japan Fisheries Association (JFA), was even more forthright. According to Mr. Takahashi:

> The JFA strongly urges the United States Congress, should the *Kokechik* decision not be judicially reversed, to amend the MMPA so as to allow incidental take of an insignificant number of marine mammals from species that have not been included in permits issued under the MMPA in the past, without discrimination between foreign fisheries and U.S. domestic fisheries.

Id. at 265 (statement of Takenobu Takahashi).

After considering his request, the subcommittee met Secretary Evans halfway: in the tradition of the Breaux amendment, it adopted an amendment that adds a new § 114 to the MMPA. The section exempts United States fishermen and foreign groundfish fishermen from compliance with the circuit court's interpretation of the MMPA insofar as it applies to the take of depleted species, but purposely leaves the holding intact insofar as it applies to the Federation. As the Committee on Merchant Marine and Fisheries explained the decision:

> Subsection (a) specifies that the new § 114 will take effect immediately on the date of enactment of this Act and will remain in effect until October 1, 1993. During that time period, this section, rather than

> §§ 101, 103, and 104 of the MMPA, shall govern the incidental taking of marine mammals by commercial fishermen other than tuna fishermen. The subsection also provides that this interim regime will be available only to persons using vessels of the United States and vessels which have valid fishing permits issued under § 204(b) of the Magnuson Fishery Conservation and Management Act. By limiting the exception in this way, the Committee intends that the Japanese salmon gillnet fleet which has been precluded from operation in the U.S. Exclusive Economic Zone by a decision of the U.S. Court of Appeals in *Kokechik Fishermen's Association v. Secretary of Commerce* will not have the provisions of § 114 available to it. The Committee does not intend § 114 of (sic) disturb the holding in that case as it applies to the Japanese salmon gillnet fleet.

H.R. Rep. No. 970, 100th Cong., 2d Sess. 21 (1988).

The House agreed with the committee's policy choice and passed the Marine Mammal Protection Act Amendments of 1988 by unanimous vote. 134 Cong. Rec. H8237-46 (daily ed. September 26, 1988).

In the Senate, Secretary Evans and Mr. Takahashi presented the same testimony they presented in the House of Representatives. *Hearing on Marine Mammal Protection Act Reauthorization before the National Ocean Policy Study of the Senate Comm. on Commerce, Science and Transportation*, 100th Cong., 2d Sess. 193, 275 (1988)(statements of William Evans and Takenobu Takahashi). However, after considering the matter, the Committee on Commerce, Science and Transportation adopted the House's new § 114. S. Rep. No. 592, 100th Cong., 2d Sess. 3-5, 15-23 (1988). The Senate agreed with the committee's decision and passed its version of the House bill by unanimous vote. 134 Cong. Rec. S16,336-46 (daily ed. October 14, 1988).

Although the Secretary and Judge Starr may question its wisdom, Congress has decided not to relieve the Federation of its obligation to comply with the MMPA as the Act has been construed by the circuit court. Having done so, the doctrine of separation of powers requires that Congress's policy choice not be disturbed.

4. The Secretary's Policy Arguments Are Not Meritorious.

In addition to his statutory construction argument, the Secretary makes three policy arguments. According to the Secretary, implementation of the circuit court opinion "would be likely to have a devastating effect on this nation's fishing industry as well as upon foreign nationals who seek to fish in waters subject to the jurisdiction of the United States," may prompt GOJ to withdraw from the INPFC in which case "Japanese interception [outside the FCZ] of salmon of United States origin could dramatically increase, leading to severe losses for domestic salmon fishermen," and "may compromise ongoing efforts to implement a comprehensive fisheries agreement with the Soviet Union." Petition for Writ of Certiorari at 22-24.

None of the Secretary's arguments are meritorious.

With respect to the effect on domestic fishermen and foreign nationals other than the Federation, as described above, after considering the matter, Congress added a new § 114 to the MMPA that grants the Secretary authority to exempt United States fishermen and foreign nationals fishing with permits issued pursuant to § 204(b) of the MFCMA, 16 U.S.C. § 1824(b), from compliance with the circuit court opinion insofar as it applies to the take of depleted species. As a result, as a matter of congressional policy, Federation members are now the *only* fishermen, foreign or domestic, who may not fish if it is likely that their nets will entangle and drown fur

seals, sea lions and other marine mammals that are members of depleted populations.

With respect to his theory that, unless the circuit court opinion is reversed, GOJ will withdraw from the INPFC, the Secretary expressed the same concern to Congress. In his testimony before the Subcommittee on Fisheries and Wildlife Conservation and the Environment, Secretary Evans told the subcommittee that:

> Although we are seeking reversal of the Court ruling, the Japanese salmon fishery may not be able to operate this summer in the U.S. EEZ as contemplated by the International North Pacific Fisheries Convention (INPFC). As a result, Japan may withdraw from, or seek to renegotiate the INPFC. This would allow them to fish in areas where the take of North American origin salmon and marine mammals would be higher than when Japan fishes inside the U.S. EEZ and targets Asian stocks of salmon.

House Hearing at 224.

After considering Secretary Evans' views, the subcommittee, and later Congress, rejected them. For good reason. First, GOJ must give a year's notice prior to withdrawing from the INPFC.[9] To date, it has not done

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[9] In pertinent part, article XII of the INPFC states:

> This Convention shall continue in force until one year from the day on which a Contracting Party shall give notice to the other Contracting Parties of an intention of terminating the Convention, whereupon it shall terminate as to all Contracting Parties.

30 U.S.T. at 1110.

so.[10] And second, should GOJ withdraw, the Federation is not free to fish the North Pacific Ocean with abandon. As discussed above, the Soviet Union closely regulates the Federation salmon fishery. The Soviet Union has been reducing the Federation's catch quotas, and recently announced its intent to compel GOJ to end the Japanese high seas salmon fishery in the North Pacific Ocean by 1992.

Finally, with respect to his assertion that the circuit court opinion "may compromise ongoing efforts to implement a comprehensive fisheries agreement with the Soviet Union," although afforded an opportunity to do so, the Secretary did not express this concern to Congress. The reason he expresses it here is difficult to discern.

Last May the Secretary of State[11] concluded negotiations with the Soviet Union on a comprehensive fisheries agreement. Agreement Between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics on Mutual Fisheries

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[10] When the argument was raised below, the district court held that the possibility that GOJ would withdraw from the INPFC was "speculative." *Federation of Japan Salmon Fisheries Cooperative Ass'n, supra* at 48. The court's assessment proved correct. On November 1 – 2 and 4, 1988, the INPFC held its annual meeting in Tokyo, Japan. GOJ did not withdraw from the INPFC.

[11] Interestingly, the Solicitor General identifies the Department of Commerce, rather than the Department of State, as the source of concern about the effect the circuit court opinion may have on the United States' relationship with the Soviet Union. Petition for Writ of Certiorari at 24.

Relations, May 31, 1988, United States-Soviet Union.[12] The agreement authorizes United States nationals to fish inside the Soviet FCZ and vice versa. With respect to marine mammals, article VI of the agreement provides:

> Each Party shall, consistent with its national law, take appropriate measures to ensure that its nationals and vessels refrain from harassing, hunting, capturing or killing any marine mammal within the zone of the other Party, or attempting such actions, except as may be provided for by an international agreement which is in force for both Parties, or in accordance with specific authorization and controls established by the Party in whose zone such actions occur.

The agreement was negotiated after the circuit court opinion was issued, and Kokechik has actual knowledge that the Soviet Union was aware of the opinion. Consequently, it is reasonable to assume that, with respect to fishing by Soviet nationals inside the FCZ, the Soviet Union understood and agreed that the phrase "specific authorization and controls established by the Party in whose zone such actions occur" refers to the MMPA as interpreted by the circuit court. Assuming that to be the case, there is no basis for the Secretary's concern.

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[12] The agreement was subsequently approved by Congress. Pub. L. No. 100-629, 102 Stat. 3286 (1988). *See* H.R. Rep. No. 968, 100th Cong., 2d Sess. 7-8 (1988).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 88-428

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

C. WILLIAM VERITY, JR., SECRETARY OF COMMERCE, *ET AL.*,

PETITIONERS,

V.

CENTER FOR ENVIRONMENTAL EDUCATION, *ET AL.*,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENTS CENTER FOR ENVIRONMENTAL EDUCATION, ET AL., IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In light of Congress' recent amendments to the Marine Mammal Protection Act, 16 U.S.C. § 1361, *et seq.* (1982 & Supp. IV), which specifically address the ruling of the court of appeals below, should this Court grant certiorari in this case?

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IN THE

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OCTOBER TERM, 1988

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C. WILLIAM VERITY, JR., SECRETARY OF COMMERCE, *ET AL.*,

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Center for Environmental Education, Greenpeace, U.S.A., Humane Society of the United States, Sierra Club, The Whale Center, Animal Protection Institute, and Society for Animal Protective Legislation respectfully request the Court to deny the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in *Kokechik Fishermen's*

Association, et al. v. Secretary of Commerce, et al., 839 F.2d 795 (D.C. Cir. 1988) (App. 1a-31a).[1]

RESPONDENTS' STATEMENT OF THE CASE

This case involves the proper application of the requirements of the Marine Mammal Protection Act (MMPA), 16 U.S.C. § 1361, *et al.* (1982 & Supp. IV), to a factory-ship drift gillnet industry operated by a Japanese fishing association (the Federation) in the waters of the North Pacific Ocean and the Bering Sea off the coast of Alaska. The Federation fleet utilizes a system of motherships and catcherboats to harvest salmon on the high seas and within the United States 200-mile Exclusive Economic Zone (EEZ) and ship them to commercial markets in Japan. (App. 8a, 40a-41a) However, the Federation's driftnets capture more than just salmon in their mesh. Once deployed, they indiscriminately, and unavoidably, entangle thousands of marine mammals as well, including Dall's porpoises, Northern fur seals, and Northern (Stellar) sea lions (App. 9a, 41a), all of which are species protected by the MMPA. 16 U.S.C. § 1361 *et al.*

Many of the entangled marine mammals drown while entrapped in the nets or are seriously injured (App. 9a, 41a). Each entanglement, whether or not the animal is killed, is a "taking" of a marine mammal under the MMPA, 16 U.S.C. § 1362(12), and the Secretary's regulations, 50 C.F.R. § 216.3 (1987). "Takings" are strictly prohibited by the moratorium in the MMPA unless the requirements for an exemption have been met and a general permit has been issued

---

[1] "App." refers to the Appendices to the petition for writ of certiorari filed on behalf of the petitioners C. William Verity, Secretary of Commerce, *et al.*. "C.A. App." refers to the Appendix filed below in the Court of Appeals. "Resp. App. refers to the Appendix to Respondents' brief, filed herewith.

by the Secretary (or Congress) authorizing the taking. 16 U.S.C. §§ 1371-74.

The Federation's salmon gillnet fleet is allowed to operate within the U.S. 200-mile zone only by permission of the United States government according to the terms of the International Convention for the High Seas Fisheries of the North Pacific Ocean (INPFC), 4 U.S.T. 380, T.I.A.S. No. 2786, an international treaty between the United States and Japan. In 1978, the INPFC was amended to make the Federation's operations within the 200-mile zone fully subject to United States laws governing the taking of marine mammals incidental to fishing operations. 30 U.S.T. 1095, T.I.A.S. No. 9242. The controlling United States law regulating the taking of marine mammals is, of course, the MMPA. Thus, by international convention agreed to by the Japanese Government, the Federation may not operate within the United States EEZ unless it is in full compliance with the MMPA's requirements. Further, under the INPFC, the Japanese Government is required to ensure that the Federation's vessels adhere to this requirement. *Id. See also* Act of July 28, 1978, Pub. L. No. 95-326, § 14(c), 92 Stat. 405 (1978) (amendment to the North Pacific Fisheries Act making Japanese vessels within the U.S. 200-mile zone subject to the MMPA).

The MMPA is an unusual statute in the extent of protection it affords marine mammals. As its central feature, the MMPA imposes a moratorium on the taking of marine mammals and sets up a series of strict requirements for obtaining an exemption from the moratorium. 16 U.S.C. § 1371(a). A takings permit may be issued by the Secretary only if specific findings regarding the health of the population stocks at issue can be made. 16 U.S.C. §§ 1371-74. The Secretary cannot authorize any takings of a marine mammal species which is below its optimum sustainable population (OSP) and hence

"depleted," as that term is defined in 16 U.S.C. § 1362(1), or of any species for which the Secretary is unable to make affirmative findings that it is above its OSP and hence not depleted. 16 U.S.C. §§ 1362(8), 1371(a)(2), 1371(a)(3), 1373. There is no question that Congress' intent in enacting this moratorium was to end takings of marine mammals which do not satisfy the requirements in the MMPA for an exemption from the moratorium and issuance of a permit. 16 U.S.C. §§ 1362(7), 1371(a); *see* H.R. Rep. No. 707, 92nd Cong., 1st Sess. 1, 15, *reprinted in* 1972 U.S. Code Cong. & Admin. News 4144, 4158.

The MMPA also contains a special section authorizing the issuance of "general permits" for the taking of marine mammals, consistent with the statute and its regulations. 16 U.S.C. § 1374(h)(1). The Secretary has promulgated regulations under this section which allow the issuance of a general permit for takings of marine mammals incidental to commercial fishing operations, based on the gear type used. *See* 50 C.F.R. 216.24(b). A commercial fishery applying for such a permit is required to identify in its permit application the species and numbers of marine mammals "expected" to be taken under the general permit. 50 C.F.R. § 216.24(b)(2)(vi). The Secretary's regulations explicitly provide that "[n]o marine mammals may be taken in the course of a commercial fishing operation unless . . . a general permit and certificate(s) of inclusion have been obtained in accordance with these regulations and such taking is not in violation of such permit, certificate(s), and regulations." 50 C.F.R. § 216.24(a)(1). This general permit was the type of takings permit that the Federation applied for in this case. (App. 5a, 40a)

In addition to enacting the original MMPA in 1972, Congress has carefully followed its progress and has several times enacted amendments to assure that its goals are met. Thus,

for the first three years after the MMPA became applicable to the Federation's operations within the U.S. 200-mile zone (from 1978 until 1981), Congress suspended full application of the MMPA's requirements in order to allow research to be conducted by Japan and the United States to determine the effect of the Japanese salmon fishery on marine mammal species and "to work to reduce or eliminate the incidental catch of marine mammals in the fishery." Act of July 28, 1978, Pub. L. No. 95-326, § 14(a)(3), 92 Stat. 405. Then, as required by statute, the Federation in 1981 applied for and was granted a three-year general permit by the Secretary of Commerce authorizing the taking of 5,500 Dall's porpoises, 450 Northern fur seals, and 25 Northern (Stellar) sea lions. (App. 4a, 39a)

Even at the time that permit was issued, however, Congress was aware of and concerned about the Federation's lack of progress in reducing the level of marine mammal takings during the interim research period from 1978-81. *See* H.R. Rep. No. 228, 97th Cong., 1st Sess. 17-18, ***reprinted in*** 1981 U.S. Code Cong. & Admin. News 1458, 1467-68. These concerns led Congress to take legislative action the very next year. In 1982, Congress amended the North Pacific Fisheries Act of 1954 (NPFA), 16 U.S.C. § 1021, *et seq.*, to rewrite the general permit issued to the Federation by the Secretary in order to hasten achievement of the MMPA's goals.

The new, stricter permit imposed by Congress was specifically aimed at achieving reductions in the marine mammal take level which had so far eluded the Japanese salmon gillnet fleet and requiring the Japanese Government to adequately fund ongoing research on the effect of the fishery on marine mammals. 16 U.S.C. § 1034.[2] As explained by Senator

[2]The permit restrictions added by Congress in the 1982 amendments to the NPFA included a specific timetable for the Federation to implement required new fishing gear designed to reduce marine mammal mortality,

Packwood, one of the primary sponsors of the legislation, "it is time for the . . . kill rate to be reduced." . . . "Encouraging [the Japanese] to do so is the goal of this particular section of the Fisheries Amendments of 1982." 128 Cong. Rec. S14361, S14364 (daily ed. December 10, 1982); *see also* 128 Cong. Rec. H9449, H9451 (daily ed. December 10, 1982).

With the takings permit enacted by Congress in 1982 due to expire on June 9, 1987, 16 U.S.C. § 1034(b), the Federation submitted a new application for a general permit under the MMPA to the Secretary on July 18, 1986. The application listed the species and numbers of marine mammals "expected to be taken" annually: 5,500 Dall's porpoise, 450 Northern fur seals, and 25 Northern (Stellar) sea lions. (App. 5a, 40a) These were the same species and numbers which were included in the 1981 general permit issued by the Secretary and the amended permit enacted into law by Congress in 1982. (App. 4a, 39a)

After extensive administrative hearings and recommended findings by an Administrative Law Judge, the Secretary concluded that he could not make the statutorily required findings regarding the optimum sustainable population (OSP) level for the Northern fur seal and the Northern sea lion. (App. 6a-8a, C.A. App.127-28, 136) In fact, the Secretary found that one population of fur seals taken in the fishery, the Pribilof Island population, was actually depleted. (App. 5a-6a, 13a) Although

16 U.S.C. § 1034(a)(2); a requirement of a Secretarial "action plan" for each year of the permit, which was "to resolve questions about the status and trends of marine mammals affected by the Japanese high seas and land-based salmon gillnet fisheries, and reduce the annual incidental take of marine mammals . . .", 16 U.S.C. § 1034(b)(2); and a requirement that the Japanese Government adequately fund continuing research on marine mammals. 16 U.S.C. § 1034(f). The Secretary was authorized to immediately suspend the general permit issued by Congressional action if he found that the Congressionally required research was not being adequately funded by Japan. 16 U.S.C. § 1034(f)(2).

he was unsure whether the other affected population of fur seals (the Commander Island population) was depleted, the Secretary was unable to make the statutorily required finding that it was at its OSP. (App. 8a, 13a, C.A. App. 136) With respect to the Northern sea lion, the Secretary declined to issue a takings permit "because of a separate agency action to list those stocks as depleted, a determination that precludes issuance of an incidental take permit under the MMPA." (C.A. App. 127)[3]

The record before the Secretary showed that takings of these prohibited species are certain to occur if the Japanese salmon gillnet fishery is allowed to operate. *Kokechik Fishermen's Association v. Secretary of Commerce*, 839 F.2d at 801 (App. 12a, 41a) The Secretary conceded that any takings of marine mammal populations which have not been found to be at OSP are unlawful under the MMPA, and he could not issue a permit to the Federation for those species. *Id.* at 798-99, 801 & n. 13 (App. 8a, 12a-13a)

Nevertheless, the Secretary issued a general permit for the fishery to operate by including in the Federation's general permit only the one species of marine mammal — the Dall's porpoise — for which he could make the required OSP findings. But even as he did so, the Secretary admitted that, if the fishery operated under the permit issued for that one species, it would inevitably entangle fur seals and sea lions in its driftnets right along with the Dall's porpoises. *Kokechik*, 839 F.2d at 801 & n. 13 (App. 12a-13a)

[3]The Secretary has recently taken separate administrative actions regarding the designation of the Pribilof Island fur seal and the Northern sea lion as depleted, based on information which shows dramatic declines in these populations over the past several years. *See* 53 Fed. Reg. 17888 (1988) (designating the fur seal as depleted); 53 Fed. Reg. 16299 (1988) (advance notice of rulemaking proposing to designate the Northern sea lion as depleted).

To get around the fact that his issuance of a general permit to the Federation would result in marine mammal takings which are contrary to the express prohibitions in the MMPA and its implementing regulations, the Secretary rationalized that Congress' purpose in requiring general permits for commercial fisheries/marine mammal interactions was "merely [to] immunize the holders and their members from liability for civil or criminal sanctions under the MMPA." (Fed. Govt. Appeals Court Brief at 12). In other words, the Secretary's main objective in issuing the permit was not to protect marine mammals as the MMPA requires — but rather to make it less expensive for the Federation to take marine mammals illegally.

The district court and the court of appeals both rejected the Secretary's rationale. *Kokechik Fishermen's Association, et al. v. Secretary of Commerce, et al.*, 679 F. Supp. 37 (D.D.C. 1987), *aff'd*, 839 F.2d 795 (D.C. Cir. 1988) (App. 1a-57a) As the court of appeals held, the Secretary's "view that the permit process functions merely to determine which takes will be exempted from civil penalties is inconsistent with [the Secretary's] duty because it allows — subject to the civil penalty price — illegal takings of other protected marine mammals." *Kokechik*, 839 F.2d at 802. (App. 14a) The court concluded that "[t]he Secretary has no authority, by regulation or any other action, to issue a permit that allows conduct prohibited by the Act." *Id.* (App. 14a) It therefore enjoined issuance of a general permit to the Federation's salmon gillnet fleet.[4]

[4]The court of appeals denied the government and the Federation's petitions for rehearing and suggestions for rehearing *en banc* on May 11, 1988. (App. 64a-67a). The Solicitor General and the Federation moved this Court for a stay of the court of appeals ruling pending certiorari on May 31, 1988. Their motions were denied on June 9, 1988. Following this Court's action on the stay requests, the Solicitor General subsequently filed a Petition for Writ of Certiorari, but the Federation did not.

There have been some important supervening developments in Congress since the Solicitor General's petition for certiorari was filed in September. Following the court of appeals' decision on February 16, 1988, both the House of Representatives and the Senate held extensive hearings which considered takings of depleted species of marine mammals by commercial fisheries, the *Kokechik* decision, and its potential implications for the continuing operation of commercial fisheries with marine mammal interactions. As Senator Stevens from Alaska remarked in his opening statement at the hearings in the Senate:

> Possible depletion of northern fur seals and stellar sea lions and the impact of the recent court decision in *Kokechik Fishermen's Association v. Secretary of Commerce* on the ability of the Commerce Department to issue general permits for domestic fishermen is something the next hearing should address. The potential impact of this on the fishing industry could be tremendous.

Hearings on the Reauthorization of the Marine Mammal Protection Act before the Senate Committee on Commerce, Science, and Transportation, 100th Cong., 2d Sess. 6 (April 13 and May 19, 1988) (S. Hrg. No. 711) (hereinafter "1988 Senate Hearings").

The May 19th Senate hearing was devoted entirely to the questions of marine mammal/commercial fisheries interactions and the effect of the *Kokechik* decision. Concern focused on the fact that there were no exemptions in the existing MMPA which would allow general permits for takings of any species found to be depleted or not affirmatively determined by the Secretary to be at its OSP, the situation which the *Kokechik* decision had brought to light. 1988 Senate Hearings at 153-54, 181. As Committee Chairman Senator Breaux summed up the issue facing Congress:

> Under current law, in no case can either a general permit or a small take exemption be issued to a fishery if any of the marine mammal species to be incidentally taken are accorded "depleted" status — that is, that the population is below the OSP level.
>
> Furthermore, very recent judicial determinations of the Act [the *Kokechik* case] confirm that a marine mammal species for which no OSP determination has been made is to be treated as if it were depleted in the context of the general permit considerations.
>
> Virtually all of the significant domestic commercial fisheries from California to Alaska have some interaction with a marine mammal that is depleted, or is soon to be found depleted or for which no OSP determination has yet been made.
>
> For example, I understand that a depletion determination for the northern fur seal has just been issued this week and proceedings are under way for making the same determination for the Steller sea lion in the near future. With the exception of the Dall's porpoise, virtually all other marine mammal species that regularly interact with West Coast fisheries have no OSP determinations.

1988 Senate Hearings at 154-155.

At the House hearings also, the major topic for consideration was the effect of the *Kokechik* decision. As described by Subcommittee Chairman Studds:

> One of the major issues for the reauthorization relates to the incidental take of marine mammals by foreign and domestic fishermen. While the Act prohibits the taking of marine mammals that are considered depleted, the National Marine Fisheries Service may allow for the taking of other marine mam-

> mals if it can be shown that the taking will not diminish their stocks below an optimum level.
>
> Recent judicial decisions have revealed the conflict between marine mammal protection, our own ignorance and the need to fish. Two courts have blocked a permit for the Japanese salmon fishery off Alaska because NMFS was unable to muster the scientific data to demonstrate that the fishery would not harm certain marine mammal populations. Because the Service has made firm population estimates for only a few species of marine mammals, the court action has effectively stalled its permit process.

Reauthorization of the Marine Mammal Protection Act, Hearings on H.R. 4189 before the Subcommittee on Fisheries and Wildlife Conservation and the Environment of the House Committee on Merchant Marine and Fisheries, 100th Cong., 2d Sess. 1-2 (May 10, 1988) (H.R. Hrg. No. 63) (hereinafter "1988 House Hearings").

Nowhere in Congress' review of this case was there any indication that Congress believed the court of appeals had not correctly applied the prohibitions in the MMPA. Nor did Congress even consider taking any action to reverse the court of appeals through legislation. However, both the House and Senate Committees reported out bills with similar language which addressed the issue of commercial fisheries/marine mammals interactions head-on by creating a new "Interim Exemption for Commercial Fisheries," in the 1988 amendments to the MMPA.[5]

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[5]*See* H.R. 4189 and S. 2810, 100th Cong., 2d Sess. (1988). H.R. 4189 passed the House of Representatives on September 26, 1988. 134 Cong. Rec. H8237 (daily ed. September 26, 1988). S.2810 passed the Senate on October 14th. 134 Cong. Rec. S16336 (daily ed. October 14, 1988). The House subsequently concurred in a Senate amendment to H.R. 4189

The Interim Exemption adds a new section (with fifteen detailed subsections) to the MMPA which solves the problem of there being no exemption in the Act to cover fishermen's takings of depleted species and species for which no OSP finding has been made. The Interim Exemption supercedes the existing provisions of the MMPA by providing a five-year special exemption which will allow commercial fisheries to operate until October 1, 1993, without otherwise satisfying the strict requirements of the MMPA for an exemption from the moratorium and issuance of a general permit to take marine mammals. Marine Mammal Protection Act Amendments of 1988, Pub. L. No. 100-711, 102 Stat. 4755 (1988) § 114 (to be codified in 16 U.S.C. § 1361 *et seq.*) (hereinafter "1988 MMPA Amendments") (Resp. App. 1a-18a).

This Interim Exemption was enacted directly in response to Congress' understanding that, after the *Kokechik* decision, general permits could not be issued for commercial fisheries which take depleted marine mammal species or where there is inadequate information to make the required OSP findings. As explained in the Senate Committee Report on the legislation:

> As a result of the *Kokechik* litigation and the designation of species as depleted, no new permits for foreign fishing operations have been issued in the last year. In addition, NOAA has indicated that renewal of permits or issuance of new permits to replace those of domestic fishermen which expire at the end of the year will not be possible, under existing provisions of the MMPA. In the absence

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not related to the *Kokechik* case. 134 Cong. Rec. H10506 (daily ed. October 19, 1988), and the Senate concurred in a further House amendment on October 21st, thus enacting H.R. 4189, as amended, on the last day of the Congressional session. 134 Cong. Rec. S17118 (daily ed. Oct. 21 1988).

> of Congressional action, this situation could result in the closing of fisheries in the North Pacific and elsewhere.

S.Rep. No. 592, 100th Cong., 2d Sess. 5 (1988) (hereinafter "1988 Senate Report"); *see also* H.R. Rep. No. 970, 100th Cong., 2d Sess. 18-20 (1988) (hereinafter "1988 House Report").

The Interim Exemption establishes detailed procedures for commercial fisheries to apply for the exemption; it requires reporting of all marine mammals taken by the fisheries and establishment of a federal observer program to conduct on-board data gathering activities; and it provides the Secretary with both emergency and general authority to take action to prevent significant adverse impacts on any marine mammal population. 1988 MMPA Amendments § 114(a),(b),(c),(e), & (g) (Resp. App. 2a-7a, 8a-13a). A separate section of the amendments requires the Secretary to prepare conservation plans for the Northern Fur Seal and the Northern (Stellar) Sea Lion by 1989 and 1990, respectively, for the express purpose of "conserving and restoring the species or stock to its optimum sustainable population." 1988 MMPA Amendments § 115(b)(1),(2). (Resp. App. 18a-20a). Notably, Congress chose to enact § 114 as an interim measure effective only until October 1, 1993. *Id.*, § 114(a). (Resp. App. 2a). The moratorium and prohibitions in the existing MMPA, which gave rise to this case and made the Interim Exemption necessary, were not changed, and, in fact, they were reauthorized by Congress in the very same legislation. 1988 MMPA Amendments § 101, 102, & 104. (Resp. App. 2a, 33a).

While Congress made the Interim Exemption expressly applicable to all affected domestic and foreign commercial fisheries operating pursuant to the Magnuson Fishery Conservation and Management Act, 16 U.S.C. § 1801, *et seq.* (1982 & Supp. IV), it excluded the Japanese drift gillnet fleet

from the exemption.[6] Congress did not take this action without fully considering the effect of its action on the Japanese salmon gillnet fleet. As explained in the House Committee Report accompanying the legislation:

> [T]his interim regime will be available only to persons using vessels of the United States and vessels which have valid fishing permits issued under section 204(b) of the Magnuson Fishery Conservation and Management Act. *By limiting the exception in this way, the Committee intends that the Japanese salmon gillnet fleet which has been precluded from operation in the U.S. Exclusive Economic Zone by a decision of the U.S. Court of Appeals in Kokechik Fishermen's Association v. Secretary of Commerce will not have the provisions of section 114 available to it. The Committee does not intend to disturb the holding in that case as it applies to the Japanese salmon gillnet fleet.*

1988 House Report at 21 (Emphasis added); *see also* 1988 Senate Report at 16 ("The Committee does not intend that this section [§ 114] affect the result of the [*Kokechik*] litigation, as it applies to the Japanese salmon driftnet fleet.") [7]

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[6]Section 114(a)(1) of the 1988 MMPA Amendments provides:

> During the period beginning on the date of enactment of this section and ending October 1, 1993, . . . the provisions of this section, rather than sections 101, 102, 103, and 104, shall govern the incidental taking of marine mammals in the course of commercial fishing operations *by persons using vessels of the United States and vessels which have valid fishing permits issued by the Secretary in accordance with section 204(b) of the Magnuson Fishery Conservation and Management Act.* (16 U.S.C. § 1824(b)) (Emphasis added). (Resp. App. 2a)

[7]The Senate Committee Report also took note of the fact that the *Kokechik* case was pending before this Court on petition for certiorari. 1988 Senate Report at 16.

The President signed the 1988 MMPA Amendments, which included the Interim Exemption for Commercial Fisheries, into law on November 23, 1988. Pub. L. No. 100-711, 102 Stat. 4755 (1988) (resp. App. 1a-35-a). Thus, the question is whether review by this Court is warranted in light of these recent amendments adopted by Congress.

REASONS FOR DENYING THE WRIT

In urging this Court to grant certiorari in this case, the Solicitor General attempts to portray the court of appeals ruling as one that departs from the general rule of deference to the agency's interpretation of a statute. The Solicitor argues that the court of appeals erred in finding that the Secretary could not ignore the MMPA's prohibition on takings of fur seals and sea lions or treat marine mammal species in isolation when he issued a general permit to the Federation to operate within the United States' 200-mile zone. However, as the court of appeals correctly recognized, the rule of deference to administrative practice cannot overcome Congress' clear expressions of intent to the contrary in a statute. *Kokechik*, 839 F.2d at 803 (App. 16a); *see also Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 & n. 9 (1984).

Congress spoke plainly on the issue in this case when it enacted the MMPA, a statute which flatly prohibits any marine mammal takings *unless under the authority of an authorized exemption and lawfully issued permit. See* 16 U.S.C. § § 1371-74. Takings without a permit are explicitly barred by the MMPA and the Secretary's implementing regulations. 16 U.S.C. §§ 1371(a), 1372(a); 50 C.F.R. § 216.24. The Federation could not qualify for a permit because it takes depleted species and species for which the Secretary is unable to make the required affirmative findings that they are at their OSP. The Secretary's rationale that the MMPA's permit

requirements are merely for the purpose of decreasing the fishery's liability for civil penalties, rather than protecting marine mammals, facilitates the very evil the MMPA was designed to prevent — illegal takings of marine mammals. The court of appeals correctly interpreted the law and review on certiorari would not likely change that result.

Moreover, Congress spoke very plainly again just recently when it enacted the 1988 MMPA Amendments and provided a detailed new "Interim Exemption for Commercial Fisheries." 1988 MMPA Amendments § 114. (Resp. App. 2a-18a). It did so specifically to address the problem under the existing Act and the *Kokechik* decision of fishermen taking depleted species and species for which no OSP determination has been made. Indeed, the addition of § 114 of the 1988 MMPA Amendments was directly precipitated by the court of appeals decision in *Kokechik*. *See* 1988 House Report at 16-20; 1988 Senate Report at 3-6. Congress knew the Federation could not qualify for a general permit under the existing Act and thus would not be able to operate within the United States 200-mile zone without the Interim Exemption, but, nevertheless, it intentionally drafted the Interim Exemption so as to exclude the Japanese driftnet fleet and reauthorized the prohibitions in the MMPA in their existing form.

Where Congress has already considered and passed legislation based upon the court of appeals' judicial interpretation in the very case for which the Solicitor General seeks certiorari, this Court's further review is not warranted. By its actions, Congress has ratified the interpretation in the *Kokechik* decision as it applies to the Japanese driftnet fleet and certiorari should be denied.

Congress' recent action also completely disposes of the Solicitor's argument that the court of appeals ruling makes the MMPA an unworkable statute with ramifications for other United States and foreign commercial fisheries operating within

the 200-mile zone. The law may be strict, but Congress has not hesitated to step in and amend the Act, as it did in this case, to create a special exemption to deal specifically with the problem of commercial fisheries/marine mammal interactions. With the enactment of the Interim Exemption in the 1988 MMPA Amendments, all affected fisheries other than the Japanese driftnet fleet will be able to continue operating, even though they may take depleted marine mammal species or species for which OSP has not been determined. 1988 MMPA Amendments § 114(a). (Resp. App. 2a). Therefore, the Solicitor's arguments regarding the potential implications of this case for other United States and foreign fisheries as a reason for granting a writ of certiorari have been answered by Congress and no longer provide any valid grounds for this Court's review.

Finally, the asserted risk to foreign relations is not supported by the facts and is not grounds for certiorari. The INPFC is in no way threatened by upholding the requirements of the MMPA as they apply to the Federation driftnet fleet, since Japan agreed as part of the INPFC amendments of 1978 that the Federation would not be allowed to operate within the United States 200-mile zone if it was not in full compliance with the MMPA. INPFC Art. X and 1978 Annex, 30 U.S.T. 1095, T.I.A.S. No. 9242. The Federation may still operate in a designated area outside the 200-mile zone under the INPFC and, in fact, it did operate there successfully during the 1988 fishing season without breaching the INPFC. *See* Respondents Center for Environmental Education's Opposition to Application for Stay Pending Filing and Disposition of Writs of Certiorari at 3-5 (filed June 6, 1988). Moreover, to the extent that foreign relations have any bearing on this case, Congress has considered them in the recent amendments to the MMPA, and this Court should not attempt to second guess Congress. *See* 1988 House Report at 21; 1988 Senate Report at 16.

Nor is there any threat to this nation's international fisheries agreements with the Soviet Union, as alleged in the Solicitor General's petition. The comprehensive fisheries agreement alluded to in the Solicitor's petition was signed on May 31, 1988, and approved by Congress on September 26th. *See* 134 Cong. Rec. H2486 (daily ed. September 26, 1988). Any Soviet fisheries which might seek permission to operate within the United States' 200-mile zone under the agreement would qualify for an Interim Exemption under the 1988 MMPA Amendments the same as any other fishery, except for the Federation, and thus will be permitted to operate, notwithstanding the *Kokechik* decision.

In sum, with Congress' recent action, there is no reason for this Court to exercise its review powers in this case and certiorari should be denied.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied in this case.

Respectfully submitted,

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December 9, 1988

APPENDIX A

H.R. 4189 **PUBLIC LAW 100-711**

One Hundredth Congress of the United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Monday, the twenty-fifth day of January, one thousand nine hundred and eighty-eight

An Act

To authorize appropriations to carry out the Marine Mammal Protection Act of 1972 for fiscal years 1989 through 1993.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Section 1. That this Act may be cited as the "Marine Mammal Protection Act Amendments of 1988".

INTERIM COMMERCIAL FISHERY EXEMPTION

Sec. 2.(a) The Marine Mammal Protection Act of 1972 (16 U.S.C. 1361 et seq.) is amended —

(1) by redesignating section 114 as section 116; and

(2) by inserting immediately after section 113 the following new section:

"INTERIM EXEMPTION FOR COMMERCIAL FISHERIES

"Sec. 114. (a)(1) During the period beginning on the date of enactment of this section and ending October 1, 1993, except as provided in paragraph (2), the provisions of this section, rather than sections 101, 103, and 104, shall govern the incidental taking of marine mammals in the course of commercial fishing operations by persons using vessels of the United States and vessels which have valid fishing permits issued by the Secretary in accordance with section 204(b) of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1824(b)). In any event it shall be the immediate goal that the incidental kill or serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate.

"(2) The provisions of this section other than subsection (e)(6)(A) shall not govern the incidental taking of marine mammals in the course of commercial yellowfin tuna fishing subject to section 104(h)(2) of this title.

"(b)(1) The Secretary shall, after consultation with the Marine Mammal Commission —

> "(A) publish in the Federal Register, for public comment, not later than sixty days after the date of enactment of this section a proposed list of those fisheries, along with a statement of the marine mammals and the approximate number of vessels or persons involved in each such fishery, that have —
>
> "(i) frequent incidental taking of marine mammals;
>
> "(ii) occasional incidental taking of marine mammals; or

(iii) a remote likelihood of or no known incidental taking of marine mammals;

"(B) publish in the Federal Register not later than one hundred and twenty days after the date of enactment of this section a final list of the fisheries and other information required by paragraph (A), together with a summary of the provisions of this section and information sufficient to advise vessel owners on how to obtain an exemption and otherwise comply with the requirements of this section; and

"(C) at least once each year thereafter, and at such other times as the Secretary considers appropriate, reexamine, based on information gathered from the program established under subsections (c), (d), (e), and (f), and other relevant sources and after notice and opportunity for public comment, the classification of fisheries and other determinations required under subparagraph (A) and publish in the Federal Register any necessary changes.

"(2)(A) An exemption shall be granted by the Secretary in accordance with this section for a vessel engaged in a fishery identified under paragraph (1)(A)(i) or (ii), upon receipt by the Secretary of a completed registration form providing the name of the vessel owner, the name and description of the vessel, the fisheries in which it will be engaged, and such other information as the Secretary considers necessary. A decal or other physical evidence that the exemption is current and valid shall be granted, and so long as the exemption remains current and valid, shall be reissued annually thereafter.

"(B) No exemption may be granted under this section to the owner of a vessel unless such vessel —

"(i) is a vessel of the United States; or

"(ii) has a valid fishing permit issued by the Secretary in accordance with section 204(b) of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1824(b)).

"(C) Notwithstanding any other provision of this title, exemptions granted under this section shall authorize the incidental taking of marine mammals, other than California sea otters, from any species or stock, including a population stock designated as depleted, but shall not authorize the intentional lethal taking of any Steller sea lion, any cetacean, or any marine mammals from a population stock designated as depleted.

"(3)(A) Beginning two hundred and forty days after the date of enactment of this section, each owner of a vessel engaged in any fishery identified under paragraph (1)(A)(i) or (ii) shall, in order to engage lawfully in that fishery —

"(i) have registered with the Secretary in order to obtain for each such vessel owned an exemption for the purpose of incidentally taking marine mammals in accordance with this section;

"(ii) ensure that a decal or such other physical evidence of a current and valid exemption as the Secretary may require is displayed on or is in the possession of the master of each such vessel; and

"(iii) report as required by subsection (c).

"(B) Any owner of a vessel receiving an exemption under this section for any fishery identified under paragraph (1)(A)(i) shall, as a condition of that exemption, take on board a natural resource observer if requested to do so by the Secretary.

"(C) An owner of a vessel engaged in a fishery identified under paragraph (1)(A((i) or (ii) who —

"(i) fails to obtain from the Secretary an exemption under this section;

"(ii) fails to maintain a current and valid exemption; or

"(iii) fails to ensure that a decal or other physical evidence of such exemption issued by the Secretary is displayed on or is in possession of the master of the vessel,

and the master of any such vessel engaged in such fishery, shall be deemed to have violated this title, and shall be subject to the penalties of this title except in the case of unknowing violations before January 1, 1990.

"(D) If the owner of a vessel has obtained and maintains a current and valid exemption from the Secretary under this section and meets the requirements set forth in this section, the owner of such vessel, and the master and new members of the vessel, shall not be subject to the penalties set forth in this title for the incidental taking of marine mammals while such vessel is engaged in a fishery to which the exemption applies.

"(E) Each owner of a vessel engaged in any fishery not identified in paragraph (1)A)(i) or (ii), and the master and crew members of such a vessel, shall not be subject to the penalties set forth in this title for the incidental taking of marine mammals if such owner reports to the Secretary, in such form and manner as the Secretary may require, instances of lethal incidental taking in the course of that fishery.

"(4) The Secretary shall suspend or revoke an exemption granted under this section and shall not issue a decal or other physical evidence of the exemption for any vessel until the owner of such vessel complies with the reporting requirements

under subsection (c) and such requirements to take on board a natural resource observer under paragraph (3)(B) as are applicable to such vessel.

"(5)(A) The Secretary shall develop, in consultation with the appropriate States, Regional Fishery Management Councils, and other interested parties, the means by which the granting and administration of exemptions under this section shall be integrated and coordinated, to the maximum extent practicable, with existing fishery licenses, registrations, and related programs.

"(B) The Secretary shall utilize newspapers of general circulation, fishery trade associations, electronic media, and other means of advising commercial fishermen of the provisions of this section and the means by which they can comply with its requirements.

"(C) The Secretary is authorized to charge a fee for the granting of an exemption under this subsection. The level of fees charged under this subparagraph shall not exceed the administrative costs incurred in granting an exemption. Fees collected under this subparagraph shall be available to the Under Secretary of Commerce for Oceans and Atmosphere for expenses incurred in the granting and administration of exemptions under this section.

"(c) The owner of each vessel holding an exemption granted under subsection (b) of this section shall regularly compile information which shall be used in a report to be submitted to the Secretary at the close of the fishing season or annually, as the Secretary may prescribe. Such report shall be submitted in such form as the Secretary may require and shall include the following:

"(1) the type of fishery engaged in by the owner's vessel;

"(2) the date and approximate time of any incidental taking of a marine mammal, together with the area in which the incidental taking occurred, the fishing gear used at the time of the incidental taking, and the species of fish involved; and

"(3) for each incidental taking, the number and species of marine mammals involved, whether the marine mammals were deterred from gear or catch, incidentally injured, incidentally killed, or lethally removed to protect gear, catch, or human life.

If there was no incidental taking of marine mammals during the reporting period, a report stating that fact shall be filed with the Secretary.

"(d)(1) The Secretary shall establish a program to enhance the quality of and verify information received from reports submitted by owners of vessels who have been granted an exemption under subsection (b) of this section. The program shall include, but not be limited to —

"(A) education efforts regarding the information that must be submitted;

"(B) interviews with fishermen; and

"(C) other such information gathering and verification activities that will enable the Secretary to determine reliably the nature, type, and extent of the incidental taking of marine mammals that occurs in a fishery.

Except to the extent authorized by the provisions of subsection (e), the program shall not include placement of observers aboard exempted vessels.

"(2) Information obtained under this subsection shall be subject to the confidentiality provisions of subsection (j).

"(e)(1) For each fishery identified under subsection (b)(1)(A)(i) of this section, the Secretary shall, after consultation with the appropriate Regional Fishery Management Councils, other Federal and State agencies, and other interested parties, and subject to paragraph (6), place observers on board exempted vessels so as to monitor not less than 20 percent nor more than 35 percent of the fishing operations by vessels in the fishery to obtain statistically reliable information on the species and number of marine mammals incidentally taken in the fishery. If the Secretary determines that fewer than 20 percent of the fishing operations by vessels in the fishery will be monitored during the course of the fishing season, the Secretary shall implement the alternative observation program described in subsection (f) to the extent necessary to supplement the observer program described in this subsection.

"(2) When determining the distribution of observers among fisheries and between vessels in a particular fishery, the Secretary shall be guided by the following standards:

"(A) the requirement to obtain the best scientific information available;

"(B) the requirement that assignment of observers is fair and equitable among fisheries and among vessels in a fishery;

"(C) consistent with paragraph (1), the requirement that no individual person or vessel, or group of persons or vessels, be subject to excessive or overly burdensome observer coverage; and

"(D) where practicable, the need to minimize costs and avoid duplication.

"(3) If the Secretary finds that, for reasons beyond his or her control, the Secretary cannot assign observers to all the fisheries identified under subsection (b(1)(A)(i) of this section at the level of observer coverage set forth in paragraph (1), the Secretary shall allocate available observers among such fisheries, consistent with paragraph (2), according to the following priority:

> "(A) those fisheries that incidentally take marine mammals from any population stock designated as depleted;
>
> "(B) those fisheries that incidentally take marine mammals from population stocks that the Secretary believes are declining;
>
> "(C) those fisheries other than those described in subparagraphs (A) and (B) in which the greatest incidental take of marine mammals occur, and
>
> "(D) any other fishery identified under subsection (b)(1(A)(i).

The Secretary may, with the consent of the vessel owner, station an observer on board a vessel engaged in a fishery not identified under subsection (b)(1)(A)(i).

"(4) Information gathered by observers shall be subject to the provisions of subsection (j). Consistent with the requirements of paragraph (1), the Secretary shall, if requested by the Appropriate Regional Fishery Management Council, or in the case of a State fishery, the State, require observers to collect additional information, including but not limited to the quantities, species, and physical condition of target and non-target fishery resources and, if requested by the Secretary of the Interior, seabirds.

"(5) Notwithstanding the provisions of paragraph (4), the Secretary may decline to require observers to collect information described in such paragraph, if the Secretary finds in writing, following public notice and opportunity for comment, that such opportunity will not contribute to the protection of marine mammals or the understanding of the marine ecosystem, including fishery resources and seabirds.

"(6) The Secretary shall not be required to place an observer on a vessel in a fishery if the Secretary finds that —

> "(A) in a situation where harvesting vessels are delivering fish to a processing vessel and the catch is not taken on board the harvesting vessel, statistically reliable informtaion can be obtained from an observer on board the processing vessel to which the fish are delivered;
>
> "(B) the facilities of a vessel for the quartering of an observer, or for carrying out observer functions, are so inadequate or unsafe that the health or safety of the observer or the safe operation of the vessel would be jeopardized; or
>
> "(C) for reasons beyond the control of the Secretary, an observer is not available.

"(7)(A) An observer on a vessel (or the observer's personal representative) under the requirements of this section or section 104 that is ill, disabled, injured, or killed from service as an observer on that vessel may not bring a civil action under any law of the United States for that illness, disability, injury, or death against the vessel or vessel owner, except that a civil action may be brought against the vessel owner for the owner's willful misconduct.

"(B(This paragraph does not apply if the observer is engaged by the owner, master, or individual in charge of a

vessel to perform any duties in service to the vessel.

"(8) There are authorized to be appropriated to the Department of Commerce for the purposes of carrying out this subsection not to exceed $2,700,000 for fiscal year 1989 and not to exceed $8,000,000 for each of the fiscal years 1990, 1991, 1992, and 1993.

"(f)(1) The Secretary shall establish an alternative observation program to provide statistically reliable information on the species and number of marine mammals incidentally taken in those fisheries identified pursuant to subsection (b)(1)(A)(i) of this section for which the required level of observer coverage has not been met or for any other fisheries about which such reliable information is not otherwise available. The alternative program shall include, but not be limited to, direct observation of fishing activities from vessels, airplanes, or points on shore.

"(2) Individuals engaged in the alternative observation program shall collect scientific information on the fisheries subject to observation, consistent with the requirements of paragraph (1) and subsection (e)(4) and (5). All information collected shall be subject to the provisions of subsection (j).

"(g)(1) The Secretary shall review information regarding the incidental taking of marine mammals and evaluate the effects of such incidental taking on the affected population stocks of marine mammals.

"(2) If the Secretary finds, based on the information received from the programs established under subsections (c), (d), (e), and (f), that the incidental taking of marine mammals in a fishery is having an immediate and significant adverse impact on a marine mammal population stock or, in the case of Steller sea lions and North Pacific fur seals, that more than 1,350 and 50, respectively, will be incidentally killed during a calendar year, the Secretary shall consult with appropriate

Regional Fishery Management Councils and State fishery managers and prescribe emergency regulations to prevent to the maximum extent practicable any further taking. Any emergency regulations prescribed under this paragraph—

"(A) shall, to the maximum extent practicable, avoid interfering with existing State or regional fishery management plans;

"(B) shall be published in the Federal Register together with the reasons therefor;

"(C) shall remain in effect for not more than one hundred and eighty days or until the end of the fishing season, whichever is earlier; and

"(D) may be terminated by the Secretary at an earlier date by publication in the Federal Register of a notice of termination if the Secretary determines the reasons for the emergency regulations no longer exist.

In prescribing emergency regulations under this paragraph, the Secretary shall take into account the economics of the fishery concerned and the availability of existing technology to prevent or minimize incidental taking of marine mammals.

"(3) If the Secretary finds, based on information received from the programs established under subsections (c), (d), (e), and (f), that incidental taking of marine mammals in a fishery is not having an immediate and significant adverse impact on a marine mammal population stock but that it will likely have a significant adverse impact over a period of time longer than one year, the Secretary shall request the appropriate Regional Fishery Management Council or State to initiate, recommend, or take such action within its authority as it considers necessary to mitigate the adverse impacts, including adjustments to requirements on fishing times or areas or the imposition of restrictions on the use of vessels or gear.

"(4) The Secretary shall impose appropriate conditions and restrictions on an exemption granted under subsection (b) if—

"(A) a Regional Fishery Management Council or State does not act in a reasonable period of time on a request made by the Secretary under paragraph (3); or

"(B) if the Secretary determines after notice and opportunity for public comment that the purposes of this section would be better served by such action.

"(h) The Secretary shall design and implement an information management system capable of processing and analyzing reports received from the programs established under subsections (c), (d), (e), and (f), and other relevant sources, including Federal and State enforcement authorities, marine mammal stranding networks, and the marine mammal researchers. The information shall be made accessible to the public on a continuing basis, but in any case no later than six months after it is received, subject to the provisions of subsection (j).

"(i) When carrying out the Secretary's responsibilities under subsections (b), (d), (e), (f) and (h) of this section, the Secretary shall, to the maximum extent practicable, utilize the services and programs of State agencies, Federal agencies (including programs established by Regional Fishery Management Councils), marine fisheries commissions, universities, and private entities, on a reimbursable basis or otherwise. The Secretary is authorized to enter into contracts and agreements to carry out his or her responsibilities and shall establish appropriate guidelines to ensure that other programs used or contracted for will meet the same standards as a program established by the Secretary. A person contracting with the Secretary to provide observer services under subsection (e) of this section must provide evidence of financial responsibility in an amount and form prescribed by the Secretary to com-

pensate employees (or their survivors) adequately for any illness, disability, injury, or death from service on a vessel.

"(j)(1) Any information collected under subsection (c), (d), (e), (f), or (h) of this section shall be confidential and shall not be disclosed except—

"(A) to Federal employees whose duties require access to such information;

"(B) to State employees pursuant to an agreement with the Secretary that prevents public disclosure of the identity or business of any person;

"(C) when required by court order; or

"(D) in the case of scientific information involving fisheries, to employees of Regional Fishery Management Councils who are responsible for fishery management plan development and monitoring.

"(2) The Secretary shall prescribe such procedures as may be necessary to preserve such confidentiality, except that the Secretary shall release or make public any such information in aggregate, summary, or other form which does not directly or indirectly disclose the identity or business of any person.

"(k) The Secretary, in consultation with any other Federal agency to the extent that such agency may be affected, shall prescribe such regulations as necessary and appropriate to carry out the purposes of this section.

"(l)(1) The Chairman of the Marine Mammal Commission shall, after consultation with interested parties and not later than February 1, 1990, transmit to the Secretary and make available to the public recommended guidelines to govern the incidental taking of marine mammals in the course of commercial fishing operations, other than those subject to section

104(h)(2), after October 1, 1993. Such guidelines shall be developed by the Commission and its Committee of Scientific Advisers on Marine Mammals and shall—

"(A) be designed to provide a scientific rationale and basis for determining how many marine mammals may be incidentally taken under a regime to be adopted to govern such taking after October 1, 1933;

"(B) be based on sound principles of wildlife management, and be consistent with and in furtherance of the purposes and policies set forth in this Act; and

"(C) to the maximum extent practicable, include as factors to be considered and utilized in determining permissible levels of such taking—

"(i) the status and trends of the affected marine mammal population stocks;

"(ii) the abundance and annual net recruitment of such stocks;

"(iii) the level of confidence in the knowledge of the affected stocks; and

"(iv) the extent to which incidental taking will likely cause or contribute to their decline or prevent their recovery to optimum sustainable population levels.

"(2) The Secretary shall advise the Chairman of the Commission in writing if the Secretary determines that any additional information or explanation of the Chairman's recommendations is needed, and the Chairman shall respond in writing to any such request by the Secretary.

"(3) On or before February 1, 1991, the Secretary, after consultation with the Marine Mammal Commission, Regional Fishery Management Councils, and other interested govern-

mental and non-governmental organizations, shall publish in the Federal Register, for public comment, the suggested regime that the Secretary considers should, if authorized by enactment of any additional legislation, govern incidental taking of marine mammals, other than those subject to section 104(h)(2), after October 1, 1993. The suggested regime shall include—

"A) the scientific guidelines to be used in determining permissible levels of incidental taking;

"(B) a description of the arrangements for consultation and cooperation with other Federal agencies, the appropriate Regional Fishery Management Councils and States, the commercial fishing industry, and conservation organizations; and

"(C) a summary of such regulations and legislation as would be necessary to implement the suggested regime.

"(4) On or before January 1, 1992, the Secretary, after consultation with the Marine Mammal Commission, and consideration of public comment, shall transmit to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives recommendations pertaining to the incidental taking of marine mammals, other than those subject to section 104(h)(2), after October 1, 1993. The recommendations shall include—

"A) the suggested regime developed under paragraph (3) of this subsection as modified after comment and consultations;

"(B) a proposed schedule for implementing the suggested regime; and

"(C) such recommendations for additional legislation as the Secretary considers necessary or desirable to implement the suggested regime.

"(m) The Secretary shall consult with the Secretary of the Interior prior to taking actions or making determinations under this section that affect or relate to species or population stocks of marine mammals for which the Secretary of the Interior is responsible under this title.

"(n) For the purposes of this section, the owner of fixed or other commercial fishing gear that is deployed with or without the use of a vessel shall be deemed to be an owner of a vessel engaged in the fishery in which that gear is deployed.

"(o) As used in this section—

"(1) the term 'fishery' has the same meaning as it does in section 3(8) of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1802(8)).

"(2) the term 'Secretary' means the Secretary of Commerce.

"(3) the term 'vessel engaged in a fishery' means a fishing vessel as defined in section 2101(11a) of title 46, United States Code, or a fish processing vessel as defined in section 2101(11b) of that title, which is engaged in fishery.

"(4) the term 'vessel of the United States' has the same meaning as it does in section 3(27) of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1802(27))."

(b) Section 102(a) of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1372(a) is amended by striking "and 113" and inserting in lieu thereof the following: "113, and 114".

(c) The table of contents contained in the first section of the Marine Mammal Protection Act of 1972 is amended by striking:

"Sect. 114. Authorization of Appropriations."

and inserting in lieu thereof the following:

"Sec. 114. Interim Exemption for Commercial Fisheries.
"Sec. 115. Status Review; Conservation Plans.
"Sec. 116. Authorization of Appropriations.".

STATUS REVIEW

Sec. 3. (a) The Marine Mammal Protection Act of 1972 (16 U.S.C. 1361 et seq.) is amended by inserting immediately after section 114, as added by section 2 of this Act, the following new section:

"STATUS REVIEW; CONSERVATION PLANS

"Sec. 115. (a)(1) In any action by the Secretary to determine if a species or stock should be designated as depleted, or should no longer be designated as depleted, regardless of whether such action is taken on the initiative of the Secretary or in response to a petition for a status review, the Secretary shall only make such a determination by issuance of a rule, after notice and opportunity for public comment and after a call for information in accordance with paragraph (2).

"(2) The Secretary shall make any determination described in paragraph (1) solely on the basis of the best scientific information available. Prior to the issuance of a proposed rule concerning any such determination, the Secretary shall publish in the Federal Register a call to assist the Secretary in obtaining scientific information from individuals and organizations concerned with the conservation of marine mammals, from persons in any industry which might be affected by the deter-

mination, and from academic institutions. In addition, the Secretary shall utilize, to the extent the Secretary determines to be feasible, informal working groups of interested parties and other methods to gather the necessary information.

"(3)(A) If the Secretary receives a petition for a status review as described in paragraph (1), the Secretary shall publish a notice in the Federal Register that such a petition has been received and is available for public review.

"(B) Within sixty days after receipt of the petition, the Secretary shall publish a finding in the Federal Register as to whether the petition presents substantial information indicating that the petitioned action may be warranted.

"C) If the Secretary makes a positive finding under subparagraph (B), the Secretary shall include in the Federal Register notice, a finding that—

> "(i) a review of the status of the species or stock will be commenced promptly; or
>
> "(ii) a prompt review of the petition is precluded by other pending status determination petitions and that expeditious progress is being made to process pending status determination petitions under this title.

In no case after making a finding under this subparagraph shall the Secretary delay commencing a review of the status of a species or stock for more than one hundred and twenty days after receipt of the petition.

"(D) No later than two hundred and ten days after the receipt of the petition, the Secretary shall publish in the Federal Register a proposed rule as to the status of the species or stock, along with the reasons underlying the proposed status determination. Persons shall have at least sixty days to submit comments on such a proposed rule.

"(E) Not later than ninety days after the close of the comment period on a proposed rule issued under subparagraph (D), the Secretary shall issue a final rule on the status of the species or stock involved, along with the reasons for the status determination. If the Secretary finds with respect to such a proposed rule that there is substantial disagreement regarding the sufficiency or accuracy of the available information relevant to a status determination, the Secretary may delay the issuance of a final rule for a period of not more than six months for purposes of soliciting additional information.

"(F) Notwithstanding subparagraphs (D) and (E) of this paragraph and section 553 of title 5, United States Code, the Secretary may issue a final rule as to the status of a species or stock any time sixty or more days after a positive finding under subparagraph (B) if the Secretary determines there is substantial information available to warrant such final status determination and further delay would pose a significant risk to the well-being of any species or stock. Along with the final rule, the Secretary shall publish in the Federal Register detailed reasons for the expedited determination.

"(b)(1) The Secretary shall prepare conservation plans—

"(A) By December 31, 1989, for North Pacific fur seals;

"(B) by December 31, 1990, for Steller sea lions; and

"(C) as soon as possible, for any species or stock designated as depleted under this title, except that a conservation plan need not be prepared if the Secretary determines that it will not promote the conservation of the species or stock.

"(2) Each plan shall have the purpose of conserving and restoring the species or stock to its optimum sustainable population. The Secretary shall model such plans on recovery

plans required under section 4(f) of the Endangered Species Act of 1973 (16 U.S.C. 1533(f)).

"(3) The Secretary shall act expeditiously to implement each conservation plan prepared under paragraph (1). Each year, the Secretary shall specify in the annual report prepared under section 103(f) of this title what measures have been taken to prepare and implement such plans.".

TAKING OF PORPOISE IN TUNA FISHERY

Sec. 4. (a) Section 101(a)(2) of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1371(a)(2)) is amended—

(1) in subparagraph (a), by striking "and" at the end;

(2) in subparagraph (B)—

(A) in clause (ii), by striking the period at the end and inserting in lieu thereof a comma; and

(B) by adding at the end, flush with the margin, the following:

"except that the Secretary shall not find that the regulatory program, or the average rate of incidental taking by vessels, of a harvesting nation is comparable to that of the United States for purposes of clause (i) or (ii) of this paragraph unless—

"(I) the regulatory program of the harvesting nation includes, by no later than the beginning of the 1990 fishing season, such prohibitions against encircling pure schools of species of marine mammals, conducting sundown sets, and other activities as are made applicable to United States vessels;

"(II) the average rate of the incidental taking by vessels of the harvesting nation is no more than 2.0

times that of United States vessels during the same period by the end of the 1989 fishing season and no more than 1.25 times that of United States vessels during the same period by the end of the 1990 fishing season and thereafter;

"(III) the total number of eastern spinner dolphin (Stenella longirostris) incidentally taken by vessels of the harvesting nation during the 1989 and subsequent fishing seasons does not exceed 15 percent of the total number of all marine mammals incidentally taken by such vessels in such year and the total number of coastal spotted dolphin (Stenella attenuata) incidentally taken by such vessels in such seasons does not exceed 2 percent of the total number of all marine mammals incidentally taken by such vessels in such year;

"(IV) the rate of incidental taking of marine mammals by the vessels of the harvesting nation during the 1989 and subsequent fishing seasons is monitored by the porpoise mortality observer program of the Inter-American Tropical Tuna Commission or an equivalent international program in which the United States participates and is based upon observer coverage that is equal to that achieved for United States vessels during the same period, except that the Secretary may approve an alternative observer program if the Secretary determines, no less than sixty days after publication in the Federal Register of the Secretary's proposal and reasons therefor, that such an alternative observer program will provide sufficiently reliable documentary evidence of the average rate of incidental taking by a harvesting nation; and

"(V) the harvesting nation complies with all reasonable requests by the Secretary for cooperation in carrying out the scientific research program required by section 104(h)(3) of this title;" and

(3) by adding at the end othe following new subparagraphs:

"(C) shall require the government of any intermediary nation from which yellowfin tuna or tuna products will be exported to the United States to certify and provide reasonable proof that it has acted to prohibit the importation of such tuna and tuna products from any nation from which direct export to the United States of such tuna and tuna products is banned under this section within sixty days following the effective date of such ban on importation to thé United States; and

"(D) shall, six months after importation of yellowfin tuna or tuna products has been banned under this section, certify such fact to the President, which certification shall be deemed to be a certification for the purposes of section 8(a) of the Fishermen's Protective Act of 1967 (22 U.S.C. 1978(a)) for as long as such ban is in effect."
(b) Paragraph (2) of section 108(a) of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1378(a)) is amended to read as follows:

"(2) initiate—

"(A) negotiations as soon as possible with all foreign governments which are engaged in, or which have persons or companies engaged in, commercial fishing operations which are found by the Secretary to be unduly harmful to any species or population stock of marine mammal, for the purpose of entering into bilateral and multilateral treaties with such countries to protect marine mammals, with the Secretary of State to pre-

pare a draft agenda relating to this matter for discussion at appropriate international meetings and forums; and

"(B) discussions with foreign governments whose vessels harvest yellowfin tuna with purse seines in the eastern tropical Pacific Ocean, for the purpose of concluding, through the Inter-American Tropical Tuna Commission or such other bilateral or multilateral institutions as may be appropriate, international arrangements for the conservation of marine mammals taken incidentally in the course of harvesting such tuna, which should include provisions for (1) cooperative research into alternative methods of locating and catching yellowfin tuna which do not involve the taking of marine mammals, (ii) cooperative research on the status of affected marine mammal population stocks, (iii) reliable monitoring of the number, rate, and species of marine mammals taken by vessels of harvesting nations, (iv) limitations on incidental take levels based upon the best scientific information available, and (v) the use of the best marine mammal safety techniques and equipment that are economically and technologically practicable to reduce the incidental kill and serious injury of marine mammals to insignificant levels approaching a zero mortality and serious injury rate;".

(c) Section 108 of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1378) is amended by adding at the end the following new subsection:

"(c) The Secretary shall include a description of the annual results of discussions initiated and conducted pursuant to subsection (a)(2)(B), as well as any proposals for further action to achieve the purposes of that subsection, in the report required under section 103(f) of this title.".

(d) Section 104(h)(2)(B) of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1374(h)(2)(B)) is amended by adding at the end the following new clauses:

"(iv) The Secretary shall, by January 1, 1989, prescribe regulations to ensure that the backdown procedure during sets of the purse seine net on marine mammals is completed and rolling of the net to sack up has begun no later than thirty minutes after sundown. The Secretary may waive or otherwise modify such regulations for—

"(I) a designated certificate holder on an observed trip if the Secretary determines, based on observer reports, that such restriction is not necessary because the certificate holder has consistently utilized fishing techniques and equipment so as to result in an incidental marine mammal mortality rate during sundown sets that is no higher than the average such rate for the fleet during daylight sets; or

"(II) all certificate holders on observed trips if the Secretary determines that such restriction is not necessary because all certificate holders have developed and are utilizing fishing techniques and equipment that assure that the incidental marine mammal mortality rate during sundown sets will be no higher than such rate during daylight sets.

"(v) The Secretary may authorize, after public notice and opportunity for comment, designated certificate holders to conduct experimental fishing operations on observed trips, under such terms and conditions as the Secretary may prescribe, for the purpose of testing proposed improvements in fishing techniques and equipment that may reduce the incidental mortality of marine mammals in the course of commercial yellowfin tuna fishing operations,

and the Secretary may waive such terms and conditions of the general permit and this section, other than the quotas on incidental taking of marine mammals and the prohibition against encircling pure schools of certain species of marine mammals, as the Secretary determines to be necessary and appropriate for the conduct of such experimental fishing.

"(vi) The Secretary, after public notice and opportunity for comment and consultation with the skippers' panel of experts established pursuant to the general permit, shall develop and implement by not later than the beginning of the 1990 fishing season a system of performance standards to maintain the diligence and proficiency of certificate holders in the use of the best marine mammal safety techniques and equipment that are economically and technologically practicable. The system shall include such arrangements as are necessary for the identification of certificate holders whose incidental marine mammal mortality rate is consistently and substantially higher than the average rate of the fleet, and for the supplemental training and observation of such certificate holders, and provisions for suspension or revocation of certificates of inclusion of those certificate holders whose unacceptably high rate of incidental taking reflects a lack of diligence or proficiency in the use of the best marine mammal safety techniques and equipment.

"(vii) It shall be unlawful to use any explosive devices other than class C explosive pest control devices in the course of commercial yellowfin tuna fishing subject to the general permit. The Secretary shall prescribe regulations, effective April 1, 1990, to prohibit or restrict the use of class C explosive pest control devices in the course of commercial yellowfin tuna fishing unless the Secretary

determines based on a study which the Secretary shall undertake, that the use of such device does not result in physical impairment or increased mortality of marine mammals.

"(viii) During the 1989 and subsequent fishing seasons, each certificated vessel shall carry on every fishing trip subject to this subsection an official observer certified by the Secretary or by the Inter-American Tropical Tuna Commission for the purpose of conducting research and observing fishing operations unless, for reasons beyond the control of the Secretary, an observer is not available for such purpose. The Secretary may waive this requirement after the 1991 fishing season and establish a less extensive observer program if the Secretary, after notice and opportunity for comment, determines that such an alternative program will provide sufficiently reliable information.

"(ix) The Secretary shall annually convene meetings with representatives of conservation and environmental organizations, the commercial tuna fishing industry, and other interested persons for the purpose of discussing the results of efforts to reduce the incidental mortality and serious injury of marine mammals under this subsection as well as throughout the international fleet as a whole and developing plans for such efforts during the next year. On or before April 1, 1992, the Secretary shall submit to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives a comprehensive report on the results of such efforts. The report shall discuss the results of the scientific research programs, performance standards, observer program, prohibition on sundown sets, development of

alternative fishing techniques, and other efforts required by this section, and shall include recommendations for such action as the Secretary considers necessary and desirable to reduce further the total mortality and serious injury of marine mammals in the course of commercial yellowfin tuna fishing throughout the international fleet.''.

(e) Section 110(a) of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1380(a)) is amended—

(1) immediately before ''The Secretary'' at the beginning of the first sentence, by inserting ''(1)''; and

(2) by adding at the end the following new paragraph:

''(2) For purposes of identifying appropriate research into promising new methods of locating and catching yellowfin tuna without the incidental taking of marine mammals, the Secretary shall contract for an independent review of information pertaining to such potential alternative methods to be conducted by the National Academy of Sciences with individuals having scientific, technical, or other expertise that may be relevant to the identification of promising alternative fishing techniques. The Secretary shall request that the independent review be submitted to the Secretary on or before September 8, 1989, and the Secretary shall submit the report of the independent review, together with a proposed plan for research, development, and implementation of alternative fishing techniques, to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives on or before December 5, 1989.''.

SCIENTIFIC RESEARCH AND PUBLIC DISPLAY PERMITS

Sec. 5. (a) Section 109(h) of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1379(h)) is amended to read as follows:

"(h)(1) Nothing in this title shall prevent a Federal, State, or local government official or employee or a person designated under section 112(c) from taking, in the course of his or her duties as an official, employee, or designee, a marine mammal in a humane manner (including euthanasia) if such taking is for—

"(A) the protection or welfare of the mammal,

"(B) the protection of the public health and welfare, or

"(C) the nonlethaal removal of nuisance animals.

"(2) Nothing in this title shall prevent the Secretary or a person designated under section 112(c) from importing a marine mammal into the United States if such importation is necessary to render medical treatment that is not otherwise available.

"(3) In any case in which it is feasible to return to its natural habitat a marine mammal taken or imported under circumstances described in this subsection, steps to achieve that result shall be taken.".

(b) Section 102(b) of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1372(b)) is amended by adding at the end the following new sentence, flush with the margin:

"Notwithstanding the provisions of paragraphs (1) and (2), the Secretary may issue a permit for the importation of a marine mammal, if the Secretary determines that such importation is necessary for the protection or welfare of the animal.".

(c) Paragraph (1) of section 101(a) of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1371(a)) is amended to read as follows:

"(1) Consistent with the provisions of section 104, permits may be issued by the Secretary for taking and importation for purposes of scientific research, public display, or enhancing the survival or recovery of a species or stock if—".

(d) Section 104(c) of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1374(c)) is amended—

(1) by striking "display or scientific research" each place it appears and inserting in lieu thereof the following: "scientific research, public display, or enhancing the survival or recovery of a species or stock";

(2) by inserting "(1)" immediately after "(c)"; and

(3) by adding at the end the following new paragraphs:

"(2) A permit may be issued for public display purposes only to an applicant which offers a program for education or conservation purposes that, based on professionally recognized standards of the public display community, is acceptable to the Secretary and which submits with the permit application information indicating that the applicant's facilities are open to the public on a regularly scheduled basis and that access to the facilities is not limited or restricted other than by the charging of an admission fee.

"(3) A permit may be issued for scientific research purposes only to an applicant which submits with its permit application information indicating that the taking is required to further a bona fide scientific purpose and does not involve unnecessary duplication of research. No permit issued for purposes of scientific research shall authorize the killing of a marine mammal unless the applicant demonstrates that a nonlethal method for carrying out the research is not feasible. The Secretary shall not issue a permit for research which involves

the lethal taking of a marine mammal from a species or stock designated as depleted, unless the Secretary determines that the results of such research will directly benefit that species or stock, or that such research fulfills a critically important research need.

"(4)(A) A permit may be issued for enhancing the survival or recovery of a species or stock only with respect to a species or stock for which the Secretary, after consultation with the Marine Mammal Commission and after notice and opportunity for public comment, has first determined that—

"(i) taking or importation is likely to contribute significantly to maintaining or increasing distribution or numbers necessary to ensure the survival or recovery of the species or stock; and

"(ii) taking or importation is consistent (I) with any conservation plan adopted by the Secretary under section 115(b) of this title or any recovery plan developed under section 4(f) of the Endangered Species Act of 1973 for the species or stock, or (II) if there is no conservation or recovery plan in place, with the Secretary's evaluation of the actions required to enhance the survival or recovery of the species or stock in light of the factors that would be addressed in a conservation plan or a recovery plan.

"(B) A permit issued in accordance with this paragraph may allow the captive maintenance of a marine mammal from a depleted species or stock only if the Secretary—

"(i) determines that captive maintenance is likely to contribute to the survival or recovery of the species or stock by maintaining a viable gene pool, increasing productivity, providing biological information, or establishing animal reserves;

"(ii) determines that the expected benefit to the affected species or stock outweighs the expected benefit of alternatives which do not require removal of animals from the wild; and

"(iii) requires that the marine mammal or its progeny be returned to the natural habitat of the species or stock as soon as feasible, consistent with the objectives of any applicable conservation plan or recovery plan, or of any evaluation by the Secretary under subparagraph (A).

The Secretary may allow the public display of such a marine mammal only if the Secretary determines that such display is incidental to the authorized maintenance and will not interfere with the attainment of the survival or recovery objectives.".

(e)(1) Section 101(a)(3)(B) of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1371(a)(3)(B)) is amended by inserting, immediately after "scientific research purposes", the following: "or enhancing the survival or recovery of a species or stock".

(2) Section 102(b) of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1372(b)) is amended by striking "research" and inserting in lieu thereof the following: "research, or for enhancing the survival or recovery of a species or stock.".

(3) Section 109(b) of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1379(b)) is amended—

(A) in paragraph (1)(E), by striking "research and public display purposes" and inserting in lieu thereof the following: "research, public display, or enhancing the survival or recovery of a species or stock"; and

(B) in paragraph (3)(B)(ii), by striking "research or public display purposes" and inserting in lieu thereof the

following: "research, public display, or enhancing the survival or recovery of a species or stock".

(4) Section 202(a)(2) of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1402(a)(2)) is amended by inserting, immediately after "scientific research", the following: ", public display, or enhancing the survival or recovery of a species or stock".

AUTHORIZATION OF APPROPRIATIONS

Sec. 6. Section 7 of the Act entitled "An Act to improve the operation of the Marine Mammal Protection Act of 1972, and for other purposes", approved October 9, 1981 (16 U.S.C. 1384 and 1407) is amended—

(1) in subsection (a), by adding at the end the following new sentence: "There are authorized to be appropriated to the Department of Commerce, for purposes of carrying out such functions and responsibilities as it may have been given under such title (other than section 114(e)(8)), $12,250,000 for fiscal year 1989, $12,740,000 for fiscal year 1990, $13,250,000 for fiscal year 1991, $13,780,00 for fiscal year 1992, and $14,331,000 for fiscal year 1993.";

(2) in subsection (b)—

(A) by striking "and" immediately after "1985,"; and

(B) by striking "and 1988" and inserting in lieu thereof the following: "1988, and 1989, $3,120,000 for fiscal year 1990, $3,240,000 for fiscal year 1991, $3,370,000 for fiscal year 1992, and $3,500,000 for fiscal year 1993"; and

(3) in subsection (c)—

(A) by striking "and" immediately after "1983,"; and

(b) by striking "and 1988" and inserting in lieu thereof the following: "1988, and 1989, $1,140,000 for fiscal year 1990, $1,190,000 for fiscal year 1991, $1,230,000 for fiscal year 1992, and $1,280,000 for fiscal year 1993".

STUDY ON MORTALITY OF ATLANTIC DOLPHIN

Sec. 7. (a) The Secretary of Commerce shall conduct a study regarding the east coast epidemic during 1987 and 1988 which has caused substantial mortality within the North Atlantic coastal population of Atlantic bottle-nosed dolphin. The study shall examine—

(1) the cause or causes of the epidemic:

(2) the effect of the epidemic on coastal and offshore populations of Atlantic bottle-nosed dolphin;

(3) the extent to which pollution may have contributed to the epidemic:

(4) whether other species and populations of marine mammals were affected by those factors which contributed to the epidemic; and

(5) any other matters pertaining to the causes and effects of the epidemic.

(b) On or before January 1, 1989, the Secretary shall submit to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives a plan for conducting the study required in subsection (a).

AMENDMENTS TO FISHERMEN'S PROTECTIVE ACT OF 1967

Sec. 8. Section 8(h)(4) of the Fishermen's Protective Act of 1967 (22 U.S.C. 1978(h)(4)) is amended to read as follows:

> "(4) The term "fish products" means any aquatic species (including marine mammals and plants) and all products thereof exported from an offending country, whether or not taken by fishing vessels of such country, or packed, processed, or otherwise prepared for export in such country or within the jurisdiction thereof."

PRIBILOF ISLAND TRUST FUNDS

Sec. 9. Section 206(e)(1) of the Fur Seal Act of 1966 (16 U.S.C. 1166(e)(1)) is amended by adding at the end the following new sentence: "In addition, there are authorized to be appropriated to the Secretary $3,200,000 for fiscal year 1989 and $1,800,000 for fiscal year 1990 to be used for the purpose of funding the Saint Paul Island Trust, as established pursuant to subsection (a)(1) of this section, and $3,700,000 for fiscal year 1990 to be used for the purpose of funding the Saint George Trust, as established pursuant to subsection (a)(1).".

Speaker of the House of Representatives.

Vice President of the United States and President of the Senate.

FILED
DEC 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

(5)

No. 88-428

In the Supreme Court of the United States

OCTOBER TERM, 1988

C. WILLIAM VERITY, JR.,
SECRETARY OF COMMERCE, ET AL., PETITIONERS

v.

CENTER FOR ENVIRONMENTAL EDUCATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

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Washington, D.C. 20530
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REPLY MEMORANDUM FOR THE PETITIONERS

We demonstrated in our petition for a writ of certiorari that there is no merit to the court of appeals' ruling that the Marine Mammal Protection Act of 1972 (MMPA), 16 U.S.C. (& Supp. IV) 1361 *et seq.*, allows the Secretary of Commerce to issue a permit for the incidental taking of a nondepleted species of marine mammal only when the Secretary can further determine that a permit may likewise issue for any other marine mammal species that will be incidentally taken during the same fishing activities. Respondent Federation of Japan Salmon Fisheries Cooperative Association (Federation) agrees with our analysis and supports the petition. Respondents Center for Environmental Education (CEE) and Kokechik Fishermen's Association (Kokechik) both defend the court of appeals' reasoning and also argue that further review is not warranted because supervening federal legislation establishes the correctness of that court's ruling and undermines its importance.

On October 21, 1988 (after we filed our petition), Congress passed the Marine Mammal Protection Act Amendments of 1988 (1988 MMPA Amendments) (see 134 Cong. Rec. S17118), which the President signed on November 23, 1988 (see 24 Weekly Comp. Pres. Doc. 1566). See Pub. L. No. 100-711, 102 Stat. 4755 (1988) (reprinted at Resp. CEE Br. in Opp. App. 1a-35a).[1] We do not dispute that the 1988 MMPA amendments decrease the immediate importance of the case. Unlike respondents CEE and Kokechik, however, we do not believe that Congress's recent action either constitutes congressional ratification of the lower court's ruling or so diminishes the importance of the case as to render further review inappropriate.

1. Contrary to respondents' contentions (Resp. CEE Br. in Opp. 15-18; Resp. Kokechik Br. in Opp. 21-25), the 1988 MMPA Amendments are anything but congressional ratification of the court of appeals' construction of the MMPA. Those amendments instead express Congress's immediate and obvious displeasure with the lower court's rewriting of the MMPA's permitting scheme.

The 1988 MMPA Amendments reflect Congress's determination not to allow the court of appeals' construction of the MMPA to be applied so as to prevent fishing by domestic fishing vessels and by other foreign vessels. Hence, the new law exempts until 1993 all vessels of the United States and all vessels (*i.e.*, foreign) holding a permit to fish pursuant to Section 204(b) of the Magnuson Fishery Conservation and Management Act (Magnuson Act), 16 U.S.C. 1824(b), from the MMPA's moratorium on the taking of marine mammals (see Resp. CEE Br. in Opp. App. 2a) and provides the Secretary of Commerce with express authority to allow the type of commercial

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[1] In our petition, we described Congress's active consideration of amendments to the MMPA (see Pet. 13 n.5).

fishing activity at issue in this case. Under the new law, the above-described vessels may engage in commercial fishing activities that will result in the incidental taking of a nondepleted species even if those same activities will also result in the incidental taking of a species for which a permit cannot issue (either because the species is depleted or because there is inadequate information to make a formal determination of the status of the species' population) (see *id.* at 4a). Indeed, the amendments *extend* the rights of those fishing vessels by affirmatively authorizing their incidental taking of those other species in specified circumstances (*ibid.*).[2]

Respondents' sole support for its ratification theory is the fact that Congress was aware of the impact of the court of appeals' decision on the Federation, but chose not to "disturb" the court's ruling to that extent (see Resp. Kokechik Br. in Opp. 23-24 (quoting H.R. Rep. 100-970, 100th Cong., 2d Sess. 21 (1988)); Resp. CEE Br. in Opp. 14 (quoting same)).[3] Respondents, however, misappre-

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[2] As our petition explains (at 16-17), the Secretary does not contend that the MMPA authorizes him to allow the incidental taking of a depleted species or a species for which there is insufficient information to make a formal determination of the species' population status. He simply maintains that the MMPA does not forbid him from issuing a permit for the incidental taking of a nondepleted species whenever a species for which a permit could not issue would also be taken by the same fishing activities. But under the Secretary's view of the MMPA (prior to the 1988 amendments), any taking of the nonpermitted species would, of course, remain unlawful and thus punishable under the Act.

[3] The Federation cannot take advantage of the interim relief provided by the 1988 amendments because, unlike other foreign vessels, the Federation's vessels do not engage in salmon fishing in the United States Exclusive Economic Zone pursuant to the Magnuson Act. Their fishing is instead authorized by the North Pacific Fisheries Act, 16 U.S.C. 1021 *et seq.*

hend Congress's purpose. Congress did not adopt the court of appeals' analysis of the MMPA permitting scheme. Nor did Congress determine that the Federation must remain subject to the permitting scheme embraced by the court of appeals. Congress simply chose to minimize the adverse effects of an intermediate appellate court's misconstruction of a federal statute, without disrupting the rights of the parties to that ongoing litigation. Whether such a limitation was sound policy can be debated,[4] but it is not tantamount to legislative ratification of the lower court's ruling.

Significantly, respondents fail to cite any statement made by Congress in enacting those amendments that affirmatively suggests that the court of appeals had correctly interpreted the requirements of the MMPA. Nor do respondents otherwise offer any indication that Congress intended, in effect, to foreclose the Secretary from seeking this Court's review of the court of appeals' ruling. Because, moreover, as respondents acknowledge (Resp. CEE Br. in Opp. 14 n.7; Resp. Kokechik Br. in Opp. 22, 26), Congress was aware that the court of appeals' decision remained subject to reversal by this Court and that the Secretary was seeking Supreme Court review (see S. Rep. 100-592, 100th Cong., 2d Sess. 16 (1988); *Marine Mammal Protection Act Authorizations: Hearing on H.R. 4819 Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 100th Cong., 2d Sess. 216, 224 (1988) (testimony of William Evans, Under Secretary of Commerce)), the absence of any such intimation in the legislative history cannot be attributed to mere over-

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[4] The Secretary recommended to Congress that it provide relief from the court of appeals' decision to the Federation. See H.R. Rep. 100-970, *supra*, at 38.

sight. In our view, Congress's decision not to "disturb" the lower court's ruling must be read in light of its awareness of the possibility of further judicial review and therefore reflects Congress's determination not to interfere with this Court's ability to undertake its own independent examination of the merits of the dispute.[5]

2. Unlike respondents, we also believe that the dispute remains sufficiently important following enactment of the 1988 MMPA Amendments to continue to warrant this Court's review. To be sure, the interim relief provided by Congress since we filed our petition substantially diminishes the adverse effects of the court of appeals' ruling. The 1988 MMPA Amendments effectively forestall, until after October 1993, much of those devastating consequences to commercial fishing by domestic and foreign vessels in United States waters that our petition predicted would occur absent this Court's or Congress's intervention (see Pet. 12-13, 22-24). Indeed, that is why the Secretary generally supported the 1988 amendments.[6]

In our view, however, the lower court's ruling remains sufficiently important to warrant this Court's attention.

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[5] Neither *United States* v. *Board of Comm'rs*, 435 U.S. 110 (1978) nor *Blau* v. *Lehman*, 368 U.S. 403 (1962), cited by respondent Kokechik (Br. in Opp. 21-22), supports its ratification theory. In *Board of Comm'rs of Sheffield*, Congress affirmatively "voice[d] its approval" of the statute's prior construction (see 435 U.S. at 134). In this case, rather than voice its approval, Congress amended the statute to provide interim relief from the court of appeals' ruling to many and otherwise chose not to "disturb" a ruling that remained subject to further review. And, in contrast to the situation here, the court of appeals' construction of the federal statute at issue in *Blau* v. *Lehman* does not appear to have been similarly subject to further review at the time that "Congress * * * left the Act as it was" (368 U.S. at 413).

[6] Of course, the Secretary did not support Congress's decision not to extend similar interim relief to the Federation. See H.R. Rep. 100-970, *supra*, at 38.

The Federation, which represents a fleet of approximately 129 Japanese "catcherboats" operating from "motherships" (see Pet. App. 41a), remains subject to the court of appeals' decision and Congress has provided domestic and other foreign fishing vessels with only "interim" relief from that decision. Hence, the more widespread impact of the court of appeals' reconstruction of the MMPA has been delayed, but not prevented.

In any event, the foreign policy implications of the Federation's current plight are enough, by themselves, to prompt the Executive Branch to continue to seek this Court's review. In order to persuade the Government of Japan to continue to work within existing international fishery agreements, the Departments of Commerce and State believe that serious efforts must be made to afford Japanese vessels a fair opportunity to fish pursuant to these agreements under this nation's laws.[7] For the reasons explained in our petition, we submit that the decision below has erroneously deprived those vessels of fishing rights by misinterpreting the applicable statutes.[8] We therefore continue to urge review by this Court—both in light of our government's international commitments to a

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[7] The Department of Commerce reports that the continued application of the court of appeals' ruling to the Federation has been a principal barrier to successful negotiations to place observers on other Japanese fishing vessels pursuant to the Driftnet Impact Monitoring, Assessment, and Control Act of 1987, Pub. L. No. 100-220, Tit. IV, § 4001, 101 Stat. 1477 (to be codified at 16 U.S.C. 1822 note).

[8] Because respondent Kokechik's extended defense of the merits of the court of appeals' ruling (see Br. in Opp. 9-21) simply repeats the errors of that court already explained in our petition, we have not here further addressed the merits of the case.

particular friendly nation and in furtherance of overall efforts to achieve marine mammal protection.

It is therefore respectfully submitted that for the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

CHARLES FRIED
Solicitor General

DECEMBER 1988

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